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GIBSON DUNN
Supreme Court Round-Up

The Supreme Court Round-Up previews upcoming cases, recaps opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case as well as a substantive analysis of the Court's actions that is organized according to the Court's argument schedule.


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1. ***Elgin v. Dep't of Treasury*, No. 11-45 (1st Cir., 641 F.3d 6; cert. granted Oct. 17, 2011; argued on Feb. 27, 2012). Whether federal district courts have jurisdiction over constitutional claims for equitable relief brought by federal employees or whether the Civil Service Reform Act impliedly precludes that jurisdiction.**

   Decided June 11, 2012 (566 U.S. __). First Circuit/Affirmed. Justice Thomas for a 6-3 Court (Alito, J., dissenting, joined by Ginsburg and Kagan, JJ.). The Court held that the comprehensive system for reviewing personnel action taken against federal employees in the Civil Service Reform Act of 1978, 5 U.S.C. § 1101 ("CSRA"), is the exclusive avenue to judicial review of the covered claims of a federal employee, even when the agency board tasked with such review is not authorized to decide the employee's Constitutional challenge. Given that the CSRA channels judicial review of covered claims to an agency review process through the Merit Systems Protection Board ("MSPB"), the proper inquiry was whether Congress' intent to preclude district court jurisdiction was "fairly discernible" from the statute. The Court answered in the affirmative, explaining that the "elaborate framework" of the CSRA contains no indication of an exception for employees bringing Constitutional claims and that the Act's purpose of creating a comprehensive review process would be undermined by extrastatutory review. Petitioners invoked *Free Enterprises Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. __, 130 S. Ct. 3138, 3143 (2010), to contend that courts must presume that Congress does not intend to limit district court jurisdiction if a finding of preclusion could foreclose all "meaningful" judicial review, the claim is "wholly collateral to a statute's review provisions," and the claim is "outside the agency's expertise." The Court, however, responded that the CSRA's delegation of jurisdiction to the MSPB is not inconsistent with those factors. Most significantly, the Court indicated that the MSPB's inability to adjudicate the Petitioners' Constitutional claims does not preclude "meaningful" review of such challenges, given that the CSRA provides for appeals to the Federal Circuit and that, even without independent factfinding capabilities, the Federal

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Circuit could take judicial notice of facts relevant to the Constitutional question or obtain additional evidence taken by the MSPB.

2. ***Armour v. City of Indianapolis*, No. 11-161 (Ind., 946 N.E.2d 553; cert. granted Nov. 14, 2011; argued on Feb. 29, 2012). Whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multi-year installment plan.**

   Decided June 4, 2012 (566 U.S. ___). Supreme Court of Indiana/Affirmed. Justice Breyer for a 6-3 Court (Roberts, C.J., dissenting, joined by Scalia and Alito, JJ.). The Court held that the implementation of a state tax law by the City of Indianapolis did not violate the Equal Protection Clause because the City had a rational basis for its tax-related distinction between property owners. Indiana law permits cities to impose the cost of sewer improvement projects on the benefitted property owners and allows such owners to choose between paying the taxes in a lump sum or over ten-year or twenty-year periods of time with interest. The City of Indianapolis originally funded its sewer projects under this law but later adopted a different tax scheme that would finance projects in part through bonds. When the City switched to the new tax system, it forgave all outstanding payments under the previous scheme but declined to refund the lump sum payments that had already been made. Those property owners who had made the lump sum payments sued the City, arguing that it improperly discriminated against them in violation of the Equal Protection Clause. The Court applied rational basis review and held, however, that the City's distinction between property owners was rationally related to the City's legitimate interests in avoiding administrative costs—both the cost of processing refunds and the cost of collecting the outstanding installment payments for years to come. The Court recognized that distinguishing past payments from future obligations is "a line well known in the law," and the City was not constitutionally required to draw a perfect line between property owners—only a rational one, which it had done.

3. ***Reichle v. Howards*, No. 11-262 (10th Cir., 634 F.3d 1131; cert. granted Dec. 5, 2011; SG as amicus, supporting Petitioners; argued on Mar. 21, 2012). Petitioners, two Secret Service agents on protective detail, arrested Respondent following an encounter with Vice President Richard Cheney. Petitioners had probable cause to arrest Respondent, who falsely denied making unsolicited physical contact with the Vice President, in violation of 18 U.S.C. § 1001. Respondent thereafter brought a First Amendment retaliatory arrest claim against Petitioners. The Questions Presented are: (1) Whether, as the Tenth Circuit siding with the Ninth Circuit held here, the existence of probable cause to make an arrest does not bar a First Amendment retaliatory arrest claim; or whether, as the Second, Sixth, Eighth, and Eleventh Circuits have held, probable cause bars such a claim, including under *Hartman v. Moore*, 547 U.S. 250 (2006). (2) Whether the Tenth Circuit erred by denying qualified and absolute immunity to Petitioners where probable cause existed for Respondent's arrest, the arrest**

comported with the Fourth Amendment, it was not (and is not) clearly established that *Hartman* does not apply to First Amendment retaliatory arrest claims, and the denial of immunity threatens to interfere with the split-second, life-or-death decisions of Secret Service agents protecting the President and Vice President.

Decided June 4, 2012 (566 U.S. ___). Tenth Circuit/Reversed and remanded. Justice Thomas for an 8-0 Court (Ginsburg, J., concurring in the judgment, joined by Breyer, J.; Kagan, J., taking no part in the consideration or decision of the case). The Court held that two members of former Vice President Richard Cheney's Secret Service detail were entitled to qualified immunity from suit based on an allegedly retaliatory arrest because it was not clearly established at the time that an arrest supported by probable cause could give rise to a First Amendment violation. "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." The Court noted that it had "never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." Although Tenth Circuit cases had established that government officials could be liable for a retaliatory arrest though the arrest was supported by probable cause, later Supreme Court cases undermined this conclusion. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court held that "a plaintiff cannot state a claim of retaliatory prosecution in violation of the First Amendment if the charges were supported by probable cause." The Court concluded that a reasonable officer could have questioned whether *Hartman* applied to retaliatory arrests as well as retaliatory prosecution, rendering the law in this area unclear. The Court held, therefore, that the Secret Service agents were entitled to qualified immunity.

4. ***Radlax Gateway Hotel v. Amalgamated Bank*, No. 11-166 (7th Cir., 651 F.3d 642; cert. granted Dec. 12, 2011; SG granted oral argument time on Apr. 2, 2012; SG as amicus, supporting Respondent; argued on Apr. 23, 2012). Section 1129(b)(2)(A) of the Bankruptcy Code sets forth three alternative standards for determining if a Chapter 11 plan is "fair and equitable" with respect to an objecting class of secured creditors. Petitioners, the Debtors, proposed a Chapter 11 plan involving the sale of assets free of liens that satisfies one of these standards by providing their secured lender with the "indubitable equivalent" of its claim pursuant to Section 1129(b)(2)(A)(iii). In an appeal certified directly from the bankruptcy court, the Seventh Circuit held that the Debtors could only satisfy the statute by allowing their secured creditor to bid its claim in lieu of cash (i.e., credit bid) at the sale pursuant to Section 1129(b)(2)(A)(ii). This holding directly conflicts with the Third Circuit's decision in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), and the Fifth Circuit's decision in *Scotia Pacific Co., LLC v. Official Unsecured Creditors' Comm.* (*In re Pacific Lumber Co.*), 584 F.3d 229 (5th Cir. 2009). The Question Presented is: Whether a debtor may pursue a Chapter 11 plan that proposes to sell assets free of liens without allowing the secured creditor to credit bid, but instead providing it with the indubitable equivalent of its claim under Section 1129(b)(2)(A)(iii) of the Bankruptcy Code.**

Decided May 29, 2012 (566 U.S. ___). Seventh Circuit/Affirmed. Justice Scalia for an 8-0 Court (Kennedy, J. took no part in the decision of the case). The Court held that a Chapter 11 "cramdown" bankruptcy plan could not be confirmed over a secured creditor's objection pursuant to 11 U.S.C. § 1129(b)(2)(A), where the plan provided for the sale of an encumbered asset free and clear of the lien without permitting the lienholder to "credit-bid" on the asset. A Chapter 11 bankruptcy plan generally requires the consent of the affected creditors. *See* 11 U. S. C. §1129(a)(8). Section 1129(b), however, provides an exception allowing a nonconsensual plan—a "cramdown" plan—that does not "discriminate unfairly" and is "fair and equitable" to each class of creditors that are affected by, and have not accepted, the plan. A "fair and equitable" cramdown plan must meet one of three requirements in Section 1129(b)(2)(A): (i) the plan allows the secured creditor to retain its lien on the asset and receive deferred cash payments, or (ii) the plan allows the asset to be sold unencumbered but "subject to section 363(k)," allowing the creditor to bid on the asset using the debt it is owed to offset the purchase price ("credit-bidding"), and then the sale proceeds are used to repay the creditor, or (iii) the plan provides the creditor with the "indubitable equivalent" of its claim. In the plan at issue, the debtors proposed to sell their property unencumbered and to repay the creditor with the sale proceeds, but did not permit the creditor to credit-bid, and therefore could not meet the requirements of clause (ii). The debtors claimed that the proposed plan could meet the requirements of clause (iii) because that clause did not expressly foreclose the possibility of an unencumbered sale without credit-bidding, unlike clause (ii). In rejecting this claim, the Court relied on the statutory interpretation canon that the specific governs the general. In order to avoid the superfluity of clause (ii), the Court held that clause (ii)'s specific terms authorizing an unencumbered sale of collateral required compliance and that the more general language in clause (iii) should not be held to apply to such a sale. Furthermore, the Court emphasized that although the canon was not an absolute rule, the debtors had pointed to no sufficient textual indications to support an alternative interpretation.

5. ***Blueford v. Arkansas*, No. 10-1320 (Ark., 2011 Ark. 8; cert. granted Oct. 11, 2011; argued on Feb. 22, 2012). Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars re-prosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.**

Decided May 24, 2012 (566 U.S. ___). Supreme Court of Arkansas/Affirmed. Chief Justice Roberts for a 6-3 Court (Sotomayor, J., dissenting, joined by Ginsburg and Kagan, JJ.). The Court held that the Double Jeopardy Clause does not bar a second prosecution of a greater offense where the first prosecution ended in a mistrial because the jury deadlocked on a lesser-included offense. In the course of informing the trial court that the Petitioner's jury was deadlocked on a lesser-included offense, the jury's forewoman announced in open court that the jury had voted unanimously to acquit the defendant of two greater offenses. The Petitioner argued that the announcement was, in substance, an acquittal. The Court disagreed. An acquittal occurs only when the jury has finally resolved "some or all of the factual elements of the offense charged." *United States v.*

Martin Linen Supply Co., 430 U.S. 564, 571 (1977). Because the jury's deliberations had not yet concluded, the Court determined that the announcement "was not a final resolution of anything." The Court acknowledged that the trial judge had instructed the jurors that they could not begin deliberating on any lesser-included offense without first voting unanimously to acquit on all greater offenses. Nonetheless, the Court explained, the instructions to the jurors did not prohibit them from reconsidering their votes to acquit on the greater offenses after they had begun deliberating on the lesser-included offense. The Court repeatedly emphasized that as long as deliberations were taking place, the earlier votes of acquittal were provisional; the jurors were always free to revisit or rescind those votes. That possibility, the Court concluded, was enough to deprive the forewoman's announcement of "the finality necessary to amount to an acquittal on those offenses." The Court then quickly dismissed the Petitioner's alternative argument that the trial court had erred by declaring a mistrial without first allowing the jury to enter an acquittal on the greater offenses, noting that the verdict forms had given the jury only two options—convict on one offense or acquit on all—and that the Double Jeopardy Clause did not require the trial court to give the jury a new option for a verdict.

6. ***Freeman v. Quicken Loans, Inc.*, No. 10-1042 (5th Cir., 626 F.3d 799; CVSG May 16, 2011; cert. supported Aug. 25, 2011; cert. granted Oct. 11, 2011; SG as amicus, supporting Petitioners; argued on Feb. 21, 2012). Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b), provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." The Question Presented is whether Section 8(b) of RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.**

   Decided May 24, 2012 (566 U.S. ___). Fifth Circuit/Affirmed. Justice Scalia for a 9-0 Court. The Court held that a plaintiff must show that a charge for settlement services was divided between two or more persons to establish a violation of Section 2607(b) of the Real Estate Settlement Procedures Act. Section 2607(b) provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." The Petitioners, who had obtained mortgage loans from the Respondent, alleged that the Respondent violated Section 2607(b) by charging them fees for which no services were provided. In finding that this provision does not prohibit collection of unearned fees by a single settlement-service provider, as opposed to transactions in which a portion of a fee is shared with other persons who did not earn the fee, the Court observed that Section 2607(b) describes two transactions. Under this provision, a charge is "made" to or "received" from a consumer by a settlement-service provider, and the provider then "give[s]," and another person "accept[s]," a "portion, split, or percentage" of the charge. The Court reasoned that this distinction "would be pointless if . . . the two transactions could be collapsed into

one," such that a single settlement-service provider could both "ma[k]e" a charge and then "accept" all of it. The Court was not persuaded by the Petitioners' argument that the consumer is the one who "give[s]" a "portion, split, or percentage" of the fee to the settlement-service provider who "accept[s]" it, observing that this reading would render the consumer a lawbreaker under the statute. Moreover, the Court found that the phrase "portion, split, or percentage," which ordinarily means a part of the whole, reinforced its conclusion that Section 2607(b) does not apply where a single settlement-service provider retains the entire fee received from a customer.

7. ***Astrue v. Capato*, No. 11-159 (3d Cir., 631 F.3d 626; cert. granted Nov. 14, 2011; argued on Mar. 19, 2012). Whether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable state intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq*.**

   Decided May 21, 2012 (566 U.S. ___). Third Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court. The Court resolved a circuit split to hold that, as a matter of statutory construction and deference to the Social Security Administration's long-held interpretation, posthumously-conceived children (i.e. children conceived through in vitro fertilization using frozen egg or sperm) are eligible for Social Security survivor benefits "only if they qualify for inheritance from the decedent under state intestacy law, or satisfy one of the statutory alternatives to that requirement." That conclusion, the Court explained, flowed naturally from the statutory structure and was consistent with the statute's "core purpose" of benefitting a decedent's dependents.

8. ***Taniguchi v. Kan Pacific Saipan, Ltd*., No. 10-1472 (9th Cir., 633 F.3d 1218; cert. granted Sept. 27, 2011; argued on Feb. 21, 2012). Section 1920 of 28 U.S.C. sets out the categories of costs that may be awarded to the prevailing party in a federal lawsuit. One of the listed categories is "compensation of interpreters." *Id.* § 1920(6). The Question Presented is whether costs incurred in translating written documents are "compensation of interpreters" and may therefore be awarded to the prevailing party in a federal lawsuit under 28 U.S.C. § 1920(6).**

   Decided May 21, 2012 (566 U.S. ___). Ninth Circuit/Vacated and remanded. Justice Alito for a 6-3 Court (Ginsburg, J., dissenting, joined by Breyer and Sotomayor, JJ.). The Court considered whether a prevailing party may be awarded costs for the translation of documents pursuant to 28 U.S.C. § 1920(6), which includes "compensation of interpreters" among the costs that courts may award to prevailing parties in lawsuits filed in federal court. The Court held that "compensation of interpreters" in 28 U.S.C. § 1920(6) does not include the cost of document translation because the ordinary meaning of the term "interpreter" is "a person who translates orally from one language to another." In 1978 Congress enacted the Court Interpreters Act, which amended Section 1920 to include "compensation of interpreters" as a sixth category of taxable costs. According to

the Court, since neither the Court Interpreters Act nor any other relevant statutory provision defines "interpreter," the word should be given its ordinary meaning. To determine the ordinary meaning of "interpreter," the Court conducted a survey of dictionary definitions of the term contemporaneous with, and prior to, the passage of the Court Interpreters Act. The Court concluded that although all of the relevant dictionaries defined "interpreter" at the time of the statute's enactment to include a person who translates orally, only a few dictionaries contained definitions broad enough to cover document translation. Further, the Court emphasized that the Oxford English Dictionary, which it described as one of the most authoritative, designated as obsolete the definition of "interpreter" that included document translation. As such, and given that "taxable costs are limited by statute and modest in scope," the Court found that Section 1920(6)'s "compensation of interpreters" should be limited to the cost of oral translation.

9. ***Holder v. Gutierrez*, No. 10-1542; *Holder v. Sawyers*, No. 10-1543 (9th Cir., 411 F. App'x 121, 399 F. App'x 313; cert. granted Sept. 27, 2011; cases consolidated Sept. 27, 2011; argued on Jan. 18, 2012). The Questions Presented are: (1) Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. § 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years." (2) Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. § 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."**

Decided May 21, 2012 (566 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kagan for a 9-0 Court. The Court resolved a circuit split and held that the Board of Immigration Appeals ("BIA") was reasonable in deciding that an alien living in the United States as a child must independently meet the immigration requirements of 8 U.S.C. § 1229b(a), without counting his parent's years of residence or immigration status. Because the BIA is entitled to *Chevron* deference when interpreting the Immigration and Nationality Act, the Court had to determine only whether the BIA's position was a reasonable construction of Section 1229b(a), and not whether it was the only possible interpretation or even the best interpretation. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). The Court noted that Section 1229b(a) sets out requirements for "the alien" and not "the alien and one of his parents" so that the BIA's interpretation was consistent with the statute's text, as well as with related definitions referring singularly to "an alien" and "the alien." In addition, neither the legislative history of Section 1229b(a) nor the INA's general purposes commanded that the BIA impute a parent's immigration status to his child, and the BIA had maintained a consistent position of declining to impute objective conditions or characteristics of the alien parent and only imputing matters involving an alien parent's state of mind. The Court thus concluded that, even if the BIA *could* adopt a parent imputation rule for

Section 1229b(a), the text and history of the statute at least permitted the BIA's no-imputation position, which was entitled to deference.

10. ***Hall v. United States*, No. 10-875 (9th Cir., 617 F.3d 1161; cert. granted June 13, 2011; argued on Nov. 29, 2011). Whether 11 U.S.C. § 1222(a)(2)(A) authorizes the bankruptcy court, in a case brought under Chapter 12 of the Bankruptcy Code, to treat as a dischargeable non-priority claim a federal tax debt arising out of the debtor's post-petition sale of a farm asset.**

    Decided May 14, 2012 (566 U.S. __). Ninth Circuit/Affirmed. Justice Sotomayor for 5-4 Court (Breyer, J., dissenting, joined by Kennedy, Ginsburg, and Kagan, JJ.). The Court held that a federal income tax liability arising from the sale of a farm during a Chapter 12 bankruptcy is not dischargeable. The bankruptcy code generally provides that a Chapter 12 bankruptcy plan must provide for the full payment of claims. Title 11 U.S.C. § 1222(a)(2)(A), by a series of cross-references, provides an exception to this rule for "any tax" that is "incurred by the [bankruptcy] estate." The Court held that the phrase "any tax . . . incurred by the estate" has a "plain and natural reading," namely, "a tax for which the estate is liable." The Court observed that, under the Internal Revenue Code, Chapter 12 estates are not liable for taxes; rather, the debtor himself is liable. The Court concluded, therefore, that a tax incurred during a Chapter 12 bankruptcy is not "incurred by the estate" and thus not dischargeable under the § 1222(a)(2)(A) exception. The Court found additional support for its position in the interplay between other sections of the bankruptcy and tax codes and the structure of the bankruptcy code as a whole. The Court rejected the argument that "incurred by the estate" means "incurred post-petition," on the ground that, although all liability incurred by the estate is incurred post-petition, not all liability incurred post-petition is incurred by the estate. It also rejected an argument based on the legislative history of § 1222(a)(2)(A), concluding that the text was not consistent with purported congressional intent.

11. ***United States v. Home Concrete & Supply*, No. 11-139 (4th Cir., 634 F.3d 249; cert. granted Sept. 27, 2011; argued on Jan. 17, 2012). As a general matter, the Internal Revenue Service ("IRS") has three years to assess additional tax if the agency believes that the taxpayer's return has understated the amount of tax owed. 26 U.S.C. § 6501(a). That period is extended to six years, however, if the taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the [taxpayer's] return." 26 U.S.C. § 6501(e)(1)(A). The Questions Presented are: (1) Whether an understatement of gross income attributable to an overstatement of basis in sold property is an "omi[ssion] from gross income" that can trigger the extended six-year assessment period. (2) Whether a final regulation promulgated by the Department of the Treasury, which reflects the IRS's view that an understatement of gross income attributable to an overstatement of basis can trigger the extended six-year assessment period, is entitled to judicial deference.**

Decided Apr. 25, 2012 (566 U.S. __). Fourth Circuit/Affirmed. Justice Breyer for a 5-4 Court except as to Part IV-C (Scalia, J. joined except for Part IV-C, concurring in part and concurring in the judgment; Kennedy, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.). The Court held that a taxpayer's overstatement of basis, and resulting understatement of gross income, is subject to a 3-year limitations period during which the Government must assess the deficiency against the taxpayer under 26 U.S.C. § 6501(a) (2000 ed.). While this 3-year period is extended to 6 years under Section 6501(e)(1)(A) "when a taxpayer 'omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return,'" the Court held that this extended limitations period did not apply to an overstatement of basis. This conclusion "follow[ed] directly from [the] Court's earlier decision in [*Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958)]," which "interpreted a provision of the Internal Revenue Code of 1939, the operative language of which [was] identical to the language now before [the Court]." "It would be difficult, perhaps impossible, to give the same language here a different interpretation without effectively overruling *Colony*, a course of action that basic principles of stare decisis wisely counsel us not to take," the Court explained. In doing so, the Court held that "differences in other nearby parts of the 1954 Code" were "too fragile to bear the significant argumentative weight the Government [sought] to place upon them" in arguing for a departure from *Colony*. The Court also rejected the Government's reliance on a recently promulgated Treasury Regulation which "depart[ed] from *Colony* and interpret[ed] the operative language of the statute in the Government's favor." The Court held that the agency's interpretation of the statute was not entitled to *Chevron* deference because "*Colony* ha[d] already interpreted the statute, and there [was] no longer any different construction that [was] consistent with *Colony* and available for adoption by the agency." The plurality would have further held that the agency was not entitled to *Chevron* deference because "[t]here [was] no reason to believe that the linguistic ambiguity noted by *Colony* reflect[ed] a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency."

12. ***Wood v. Milyard*, No. 10-9995 (10th Cir., 403 F. App'x 335; cert. granted and Questions Presented reworded Sept. 27, 2011; SG as amicus, supporting Respondents; argued on Feb. 27, 2012). The Questions Presented are: (1) Does an appellate court have the authority to raise sua sponte a 28 U.S.C. § 2244(d) statute of limitations defense? (2) Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of [the petitioner's] habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had?**

Decided Apr. 24, 2012 (566 U.S. __). Tenth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Thomas, J., concurring in the judgment, joined by Scalia, J.). The Court held that the Tenth Circuit abused its discretion by dismissing Petitioner's habeas petition on the ground that it was untimely when the State had deliberately waived this defense in the district court. After Petitioner filed a habeas corpus petition, the State twice informed the district court that it would not contest the timeliness of the petition, and the district court rejected

Petitioner's claims on their merits. On appeal, after ordering Petitioner and the State to address the timeliness issue, the court of appeals affirmed the denial of the petition solely on the ground that it was late. Consistent with its decisions in *Granberry v. Greer*, 481 U.S. 129 (1987), and *Day v. McDonough*, 547 U.S. 198 (2006), the Court first concluded "that courts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative." Distinguishing forfeited defenses from those that are waived, however, the Court held that the "discretion to take up timeliness [does not] hold when a State is aware of a limitations defense, and intelligently chooses not to rely on it in the court of first instance."

13. ***Kappos v. Hyatt,* No. 10-1219 (Fed. Cir., 625 F.3d 1320; cert. granted June 27, 2011; argued on Jan. 9, 2012). The Questions Presented are: (1) Whether a plaintiff who is appealing the denial of an application of a patent by commencing a civil action against the Director of the United States Patent and Trademark Office ("PTO") in a federal district court pursuant to 35 U.S.C. § 145, may introduce new evidence that could have been presented to the agency in the first instance. (2) Whether, when new evidence is introduced under Section 145, the district court may decide *de novo* the factual questions to which the evidence pertains, without giving deference to the prior decision of the PTO.**

    Decided Apr. 18, 2012 (566 U.S. __). Federal Circuit/Affirmed. Justice Thomas for a 9-0 Court (Sotomayor, J., concurring, joined by Breyer, J.). The Court held that a patent applicant who challenges the Patent and Trade Office ("PTO") Director's denial of a patent claim in federal district court under 35 U.S.C. § 145 may present new evidence in federal court that could have been presented to the agency in the first instance. Specifically, the Court held that Section 145, which expressly permits applicants to present evidence, does not impose unique evidentiary limits in district court proceedings or establish a heightened standard of review for PTO factual findings. Accordingly, there are no limits on the patent applicant's ability to present new evidence beyond those present in the Federal Rules of Evidence and the Federal Rules of Civil Procedure. The Court also held that where the newly submitted evidence contradicts the PTO's factual findings, the court cannot defer to the PTO's factual findings under the Administrative Procedure Act but must make de novo findings that take account of both the new evidence and the administrative record before the PTO. Moreover, no exhaustion principles apply to the submission of new evidence because "by the time a § 145 proceeding occurs, the PTO's process is complete," and Section 145 does not provide for a remand to the PTO to consider new evidence. The Court concluded by noting that the district court may consider whether the applicant had an opportunity to present the newly proffered evidence before the PTO in deciding what weight to afford that evidence on review.

14. ***Mohamad v. Rajoub*, No. 11-88 (D.C. Cir., 634 F.3d 604; cert. granted Oct. 17, 2011, to be argued in tandem with *Kiobel v. Royal Dutch Petroleum*, No. 10-1491; SG as amicus, supporting affirmance; argued on Feb. 28, 2012).**

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants that are not natural persons.

Decided Apr. 18, 2012 (566 U.S. __). D.C. Circuit/Affirmed. Justice Sotomayor for a 9-0 Court (Scalia, J., not joining Part III-B; Breyer, J., concurring). The Court held that the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note § 2(a), does not authorize a cause of action against organizations. The TVPA imposes liability on "[a]n individual" who commits an act of torture or extrajudicial killing, but it does not define the term "individual." Relying on the term's ordinary meaning, the distinction drawn in the Dictionary Act between individuals and entities, and the manner in which other statutes use the term, the Court concluded that the term "individual" is most naturally read to encompass only natural persons, not corporations, organizations, or other entities. And the Court found nothing in the text or structure of the TVPA to indicate that Congress intended to use the term "individual" in a manner that extends beyond its ordinary meaning. The Petitioners argued that federal tort statutes uniformly provide for liability against organizations, but the Court concluded that the text of the TVPA evinced a clear intent not to subject organizations to liability. After emphasizing that the text's clarity made analysis of the TVPA's legislative history unnecessary, the Court nonetheless explained that the TVPA's legislative history provides additional evidence that Congress intended to impose liability only on natural persons. Finally, the Court rebuffed the Petitioners' claim that limiting liability under the TVPA to individuals would render the Act toothless, pointing out that "Congress appeared well aware of the limited nature of the cause of action it established in the Act."

15. ***Filarsky v. Delia*, No. 10-1018 (9th Cir., 621 F.3d 1069; cert. granted Sept. 27, 2011; SG as amicus, supporting Petitioner; argued on Jan. 17, 2012). Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee.**

Decided Apr. 17, 2012 (566 U.S. __). Ninth Circuit/Reversed. Chief Justice Roberts for a 9-0 Court (Ginsburg, J., concurring; Sotomayor, J., concurring). The Court held that an individual who is temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under § 1983. The Court looked to general common law principles regarding tort immunities and defenses and noted that when Congress enacted § 1983, it did not distinguish between full-time public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities. Holding that common law principles of immunity were incorporated into § 1983 and should not be abrogated absent clear legislative intent, the Court acknowledged that none of the reasons that it had previously given for recognizing immunity under § 1983 counseled against applying the common law rule to non-full-time government employees. First, the government interest in avoiding "unwarranted timidity" by those engaged in the public's business was equally implicated regardless of the whether the sued individual worked full-time for the government or on some other

basis. Second, affording immunity to those acting on the government's behalf ensured that talented candidates would not be deterred from entering public service by the threat of damage suits. Third, the public interest in ensuring performance of government duties free from distractions that accompany lawsuits is implicated whether those duties are discharged by private individuals or permanent government employees. Finally, the Court observed that distinguishing among those carrying out the public's business based on their particular relationship with the government creates line-drawing problems and lessens predictability. The Court concluded by holding that its conclusion was not contrary to *Wyatt v. Cole*, 504 U.S. 158 (1992), or *Richardson v. McKnight*, 521 U.S. 399 (1997). *Wyatt* was inapposite because it involved defendants "who had no connection to government and pursued purely private ends," whereas Filarsky was an attorney hired by the government to assist in conducting an official investigation into potential wrongdoing. *Richardson* was inapposite because it pertained to private prison guards hired by private prisons and was a "self-consciously 'narrow[]' decision."

Gibson Dunn – Counsel for Novo Nordisk A/S and Novo Nordisk Inc.

16. ***Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, No. 10-844 (Fed. Cir., 601 F.3d 1359; CVSG Mar. 28, 2011; cert. supported May 26, 2011; cert. granted June 27, 2011; SG as amicus, supporting Petitioners; argued on Dec. 5, 2011). When the Food & Drug Administration ("FDA") approves a drug for multiple uses, the Hatch-Waxman Act (the "Act") allows generic drug makers to avoid contested patent litigation by marketing generic versions of the drug solely for non-patented uses. According to Petitioners, the FDA defers to name-brand drug companies' 140-character descriptions of the scope of their method of use patents, and such companies can therefore block the approval of generic drugs by submitting overbroad patent method of use descriptions to the FDA. The Act allows a "counterclaim seeking an order requiring the [patent] holder to correct or delete the patent information submitted by the holder . . . on the ground that the patent does not claim . . . an approved method of using the drug." 21 U.S.C. § 355(j)(5)(C)(ii)(I). The Question Presented is whether the Act's counterclaim provision applies where (1) there is "an approved method of using the drug" that "the patent does not claim," and (2) the brand submits "patent information" to the FDA that misstates the patent's scope, requiring "correct[ion]."**

Decided Apr. 17, 2012 (566 U.S. __). Federal Circuit/Reversed and remanded. Justice Kagan for a 9-0 Court (Sotomayor, J., concurring). The case involves the scope of a statutory provision that allows a generic drug manufacturer to "assert a counterclaim seeking an order requiring the [brand] to correct or delete the patent information submitted by the [brand]" to the FDA "on the ground that the patent does not claim . . . an approved method of using the drug." 21 U.S.C. § 355(h)(5)(C)(ii)(I). A drug manufacturer produced a diabetes drug that was approved for three uses by the FDA. The drug manufacturer's patent only covered one of the three uses, but it submitted a "summary" of its patent to the FDA that included all three approved uses. Because the FDA cannot authorize a generic drug that would infringe a brand manufacturer's patent, the drug manufacturer's erroneous summary barred a generic manufacturer from marketing a generic version of the drug that covered the unpatented uses. Accordingly, the generic

manufacturer filed suit under Section 355, seeking to "correct" the brand manufacturer's description of its patent. The district court granted summary judgment to the generic company, but the Federal Circuit reversed, holding that a generic manufacturer can prevail under Section 355 only if it can prove that the branded manufacturer's patent does not extend to "any" approved method of use. The Court rejected the Federal Circuit's interpretation, construing section 355 to permit a generic manufacturer to prevail under Section 355 where the drug manufacturer's patent summary does not include any covered use, and where the patent summary misdescribes the patent's scope.

17. ***Vasquez v. United States*, No. 11-199 (7th Cir., 635 F.3d 889; cert. granted Nov. 28, 2011; argued on Mar. 21, 2012). The Questions Presented are: (1) Whether the Seventh Circuit violated this Court's precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on this jury at all. (2) Whether the Seventh Circuit violated Mr. Vasquez's Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case.**

    Decided Apr. 2, 2012 (566 U.S. ___). Seventh Circuit/Dismissed as improvidently granted in a per curiam opinion.

18. ***Florence v. Board of Chosen Freeholders of the County of Burlington*, No. 10-945 (3d Cir., 621 F.3d 296; cert. granted Apr. 4, 2011; SG as amicus, supporting Respondents; argued on Oct. 12, 2011). Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense.**

    Decided Apr. 2, 2012 (566 U.S. ___). Third Circuit/Affirmed. Justice Kennedy for a 5-4 Court (Thomas, J., joining all but Part IV; Roberts, C.J., concurring; Alito, J., concurring; Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan JJ.). The Court held that the Fourth and Fourteenth Amendments do not require that correctional officers limit strip searches of new detainees to persons arrested for "serious crime[s] or for any offense involving a weapon or drugs," or to persons whom officers particularly suspect are hiding contraband. In so holding, the Court noted that "deference must be given to the officials in charge of the jail unless there is 'substantial evidence' demonstrating their response to the situation is exaggerated." No such substantial evidence was shown here, where Petitioner was strip-searched at two different correctional facilities after he was arrested on a bench warrant during a traffic stop. The Court concluded that correctional officials have a "significant interest" in screening new detainees for disease or infection, gang-affiliation, and contraband, which sometimes can be detected only through invasive searches. And the Court determined that limiting strip searches to persons arrested for serious crimes would be both ineffective (because "the seriousness of an offense is a poor predictor of who has

contraband") and "unworkable" (because "it would be difficult in practice to determine whether individual detainees fall within the proposed exemption"). Instead, the Court concluded that the search procedures at issue "struck a reasonable balance between inmate privacy and the needs of the institutions."

19. ***Rehberg v. Paulk*, No. 10-788 (11th Cir., 611 F.3d 828; cert. granted Mar. 21, 2011; SG as amicus, supporting Petitioner; argued on Nov. 1, 2011). In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Court held that law enforcement officials enjoy absolute immunity from civil liability under 42 U.S.C. § 1983 for perjured testimony that they provide at trial. But in *Malley v. Briggs*, 475 U.S. 335 (1986), the Court held that law enforcement officials are *not* entitled to absolute immunity when they act as "complaining witnesses" to initiate a criminal prosecution by submitting a legally invalid arrest warrant. The federal courts of appeals have since divided about how *Briscoe* and *Malley* apply when government officials act as "complaining witnesses" by testifying before a grand jury or at another judicial proceeding. The Question Presented is whether a government official who acts as a "complaining witness" by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages.**

Decided Apr. 2, 2012 (566 U.S. ___). Eleventh Circuit/Affirmed. Justice Alito for a 9-0 Court. The Court held that witnesses in a grand jury proceeding are entitled to the same absolute immunity from suit under 42 U.S.C. § 1983 as a witness who testifies at trial. In *Briscoe v. LaHue*, 460 U.S. 352 (1983), the Court held that trial witnesses are absolutely immune from any claim based on their testimony. Without such immunity for trial witnesses, the "truth-seeking process at trial would be impaired" as witnesses might be reluctant to testify or might give testimony more favorable to the potential plaintiff for fear of liability. The Court reasoned that these same "factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses." Just as with trial witnesses, exposing grand jury witnesses to prosecution might deprive the tribunal of critical evidence. The Court also rejected the Petitioner's argument that absolute immunity should not be extended to "complaining witnesses."

20. ***Setser v. United States*, No. 10-7387 (5th Cir., 607 F.3d 128; cert. granted June 13, 2011; argued on Nov. 30, 2011). The Questions Presented are:**
(1) Whether a district court has authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence.
(2) Whether it is reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences.

Decided Mar. 28, 2012 (566 U.S. ___). Fifth Circuit/Affirmed. Justice Scalia for a 6-3 Court (Breyer, J., dissenting, joined by Kennedy and Ginsburg, JJ.). The Court held that a federal district judge has the authority to decide whether a federal sentence should run concurrently or consecutively to an anticipated state prison sentence, despite the fact that 18 U.S.C. § 3584(a)—which discusses concurrent or consecutive sentences when multiple terms "are imposed on a defendant at the

same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment"—fails to address anticipated state sentences. The Court rejected the application of the *expressio unius* canon to Section 3584 because it did not read the provision as a grant of authority to district courts. Rather, the Court read Section 3584 as an acknowledgment of district courts' preexisting, common law-derived authority over criminal sentencing. Accordingly, the statutory text did not foreclose a district court's exercise of its discretion with respect to anticipated sentences. Petitioner and the Government asserted that the Bureau of Prisons has the authority to decide whether a sentence is concurrent or consecutive once the state court has actually sentenced a prisoner under 18 U.S.C. § 3621(b). Section 3621(b) authorizes the Bureau to order that a prisoner serve his federal sentence in any suitable prison facility "whether maintained by the Federal Government or otherwise," meaning that the Bureau could order that a prisoner serve his federal sentence in a state prison, effectively making a federal and state sentence concurrent, or decline to do so, making them consecutive. The Court disagreed with this proposition, noting that Section 3621(b) does not address anticipated sentences, and holding that the Bureau of Prisons should not be given what amounts to sentencing authority, a traditional power of the court.

21. ***FAA v. Cooper*, No. 10-1024 (9th Cir., 622 F.3d 1016; cert. granted June 20, 2011; argued on Nov. 30, 2011). Whether a plaintiff who alleges only mental and emotional injuries can establish "actual damages" within the meaning of the civil remedies provision of the Privacy Act, 5 U.S.C. § 552a(g)(4)(A).**

Decided Mar. 28, 2012 (566 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Alito for a 5-3 Court (Sotomayor, J., dissenting, joined by Ginsburg and Breyer, JJ. Kagan, J., not participating). The Court held that the authorization of suits against the government for "actual damages" in the Privacy Act of 1974 is not sufficiently clear to constitute a waiver of sovereign immunity from suits for mental and emotional distress. The key to the Court's analysis was the sovereign-immunity canon, which teaches that a waiver of sovereign immunity must be unequivocally expressed in the statutory text. The meaning of the term "actual damages," the Court explained, is far from clear. The term is a "chameleon" that carries different meanings based on the context. In certain statutes it refers to non-pecuniary harm; other statutes use it more narrowly to refer strictly to economic injury. The Court's analysis of the Privacy Act led it to conclude that the Act used the term in its narrower sense. In *Doe v. Chao*, 540 U.S. 614 (2004), the Court had observed that the Privacy Act's damages provisions—which condition a plaintiff's right to recover a minimum award of $1,000 upon proof of "actual damages"—parallel the remedial scheme for the common-law torts of libel per quod and slander. That scheme allows plaintiffs to recover "general damages" only if they also prove "special damages," the latter of which include only actual pecuniary loss. The parallel between the Privacy Act and the torts of libel per quod and slander, the Court explained, was evidence that Congress conceivably could have used the term "actual damages" to mean special damages. And since it was plausible to read the term "actual damages" as being limited to economic injury, the Court concluded that the sovereign-immunity canon required it to do so:

"To do otherwise would expand the scope of Congress's sovereign-immunity waiver beyond what the statutory text clearly requires."

Gibson Dunn – Counsel for National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner

22. ***Vartelas v. Holder*, No. 10-1211 (2d Cir., 620 F.3d 108; cert. granted Sept. 27, 2011; argued on Jan. 18, 2012). The Court in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), held that a lawful permanent resident ("LPR") may make "innocent, casual, and brief" trips abroad without fear that he will be denied reentry. The Illegal Immigration Reform and Responsibility Act, 8 U.S.C. § 1101(a)(13)(C)(v), abrogates that holding with respect to an LPR who "has committed" a certain type of criminal offense. The Question Presented is whether the Act should be applied retroactively to a guilty plea taken prior to the effective date of the Act.**

Decided Mar. 28, 2012 (566 U.S. ___). Second Circuit/Reversed and remanded. Justice Ginsburg for a 6-3 Court (Scalia, J., dissenting, joined by Thomas and Alito, JJ.). The Court held that for lawful permanent residents convicted a crime before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), the pre-IIRIRA regime governs, which permitted brief travel abroad. In *Rosenberg v. Fleuti*, the Court had held that lawful permanent residents did not make an "entry" into the United States for immigration purposes when they returned from "innocent, casual, and brief excursion[s] . . . outside this country's borders." 374 U.S. 449, 462 (1963). In 1996, however, Congress passed IIRIRA in which it abolished the *Fleuti* "entry" exception so that lawful permanent residents returning from brief trips abroad were nonetheless considered to be seeking admission into the United States if they have been convicted of certain crimes of moral turpitude, like the one of which Petitioner had been convicted. Petitioner, who had been convicted before the passage of IIRIRA, invoked the Court's presumption against retroactivity, asserting that Congress did not unambiguously make IIRIRA retroactive, and the law attached a "new disability" to events that had already taken place. The Court agreed, rejecting the Second Circuit's holding that Petitioner had to demonstrate reliance on the prior law in structuring his criminal conduct. The Court concluded that reliance is not required and, regardless, Petitioner likely had relied on then-existing immigration law.

Gibson Dunn – Counsel for Members of United States Senate and House of Representatives as Amici Curiae in Support of Petitioner

23. ***Zivotofsky v. Clinton*, No. 10-699 (D.C. Cir., 571 F.3d 1227; cert. granted and additional Question Presented added by the Court May 2, 2011; argued on Nov. 7, 2011). Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, directs the Secretary of State to identify a United States citizen born in Jerusalem, upon the citizen's request, as born in "Israel" on a passport or a Consular Report of Birth Abroad. The Questions Presented are the following: (1) Whether the political question doctrine deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport. (2) Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns.**

Decided Mar. 26, 2012 (566 U.S. __). D.C. Circuit/Vacated and remanded. Chief Justice Roberts for an 8-1 Court. Sotomayor, J., concurring in part and concurring in the judgment, joined by Breyer, J. as to Part I. Alito, J., concurring in the judgment. Breyer, J., dissenting.). The Court held that the political question doctrine did not bar courts from deciding the constitutionality of § 214(d) of the Foreign Relations Authorization Act, which permits U.S. citizens born in Jerusalem to request that their passports state "Israel" as their place of birth. The State Department had argued that suits to enforce § 214 were not justiciable because they unreasonably interfered with the President's authority to dictate U.S. policy regarding the status of Jerusalem, and thus presented a political question. The Court disagreed, holding that because the issue in the case is whether § 214 is constitutional, and not whether its conclusions regarding Jerusalem are correct, courts are competent to decide the matter and can do so without opining on the status of Jerusalem. The Court also was satisfied that the political question doctrine should not apply for the reason that there is "a lack of judicially discoverable and manageable standards for resolving" the case, inasmuch as both parties offered detailed arguments concerning § 214(d)'s constitutionality. Having determined that Petitioner's case is justiciable, the Court remanded the case to the lower courts to consider the merits in the first instance.

24. ***Credit Suisse Securities v. Simmonds*, No. 10-1261 (9th Cir., 638 F.3d 1072; cert. granted June 27, 2011; SG as amicus, supporting neither party; argued on Nov. 29, 2011). Whether the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is subject to tolling, and, if so, whether tolling continues even after the receipt of actual notice of the facts giving rise to the claim.**

Decided Mar. 26, 2012 (566 U.S. __). Ninth Circuit/Vacated and remanded. Justice Scalia for an 8-0 Court (Roberts, C.J. did not participate). Section 16(a) of the Securities Exchange Act of 1934 requires corporate insiders to disclose personal transactions involving the corporation's securities. If an insider profits from the purchase and sale, or sale and purchase, of the corporation's securities within a six-month period, then § 16(b) authorizes the corporation or its shareholders to sue the insider for the profits. Such suits are subject to a two-year statute of limitations, which runs from "the date such profit was realized." In *Credit Suisse*, the plaintiff had sued in 2007 for violations relating to the alleged manipulation of the aftermarket prices of several stocks initially offered to the public in the late 1990s and the year 2000. The Ninth Circuit held that the plaintiff's claim was not time-barred because the statute of limitations was tolled until the defendants filed § 16(a) disclosures. A unanimous Supreme Court reversed, holding that normal equitable tolling principles—i.e., that tolling applies only so long as the plaintiff is diligently pursuing her rights, and some extraordinary circumstance stands in her way—govern the § 16(b) statute of limitations, and that the Ninth Circuit's special rule was inconsistent with those principles because it tolled the statute even after the plaintiff knew or had reason to know of the defendant's wrongful conduct. The Court remanded to allow the lower courts to apply equitable principles in the first instance. Chief Justice Roberts did not participate in the case, and the Court was divided 4 to 4 on

petitioners' contention that § 16(b) establishes a period of repose that is not subject to tolling. Accordingly, the Court affirmed the Ninth's Circuit's rejection of this contention without precedential effect.

25. ***Lafler v. Cooper*, No. 10-209 (6th Cir., 376 F. App'x 563; cert. granted Jan. 7, 2011; SG as amicus, supporting Petitioner; argued on Oct. 31, 2011). Respondent Anthony Cooper faced charges for assault with intent to murder. His counsel advised him to reject a plea offer based on a misunderstanding of Michigan law. Cooper rejected the offer, and he was convicted as charged. Cooper does not assert that any error occurred at the trial. On habeas review, the Sixth Circuit found that because there is a reasonable probability that Cooper would have accepted the plea offer had he been adequately advised, his Sixth Amendment rights were violated. The writ was conditioned on the State reoffering the plea agreement. The Questions Presented are as follows: (1) Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain, but the defendant is later convicted and sentenced pursuant to a fair trial? (2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?**

Decided Mar. 21, 2012 (566 U.S. ___). Sixth Circuit/Vacated and remanded. Justice Kennedy for a 5-4 Court (Scalia, J., dissenting, joined by Thomas, J. and joined as to all but Part IV by Roberts, C.J.; Alito, J., dissenting). The Court held that the Sixth and Fourteenth Amendments permit criminal defendants to challenge a conviction on the basis that they would have accepted an earlier plea offer but for advice of counsel that fell below the standard guaranteed by the Constitution. Under the two-part test adopted in *Strickland v. Washington*, 466 U.S. 226 (1984), a criminal defendant may challenge a guilty plea based on ineffective assistance of counsel if the defendant can show "that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The Court extended this framework to criminal defendants who reject a plea offer based on objectively unreasonable advice of counsel. In that situation, the defendant can establish that the result would have been different by showing that the plea offer "would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it . . .), that the court would have accepted its terms, and that the conviction or sentence, or both," would have been less severe than that imposed after conviction. The Court rejected the argument that the Sixth Amendment applies only to pretrial errors to the extent that they affect the fairness of trial. Rather, the Court held, the trial caused the injury resulting from counsel's ineffective assistance by imposing on the defendant a more severe punishment than would have resulted if no constitutional violation had occurred. The Court also held that the appropriate remedy when ineffective assistance of counsel leads to a rejected plea bargain and a trial conviction is to order the prosecution to reoffer the plea agreement and permit the trial court to exercise its

discretion in determining whether to vacate some or all of the convictions, or to leave the convictions and sentence from trial undisturbed.

26. ***Missouri v. Frye*, No. 10-444 (Mo. Ct. App., 311 S.W.3d 350; cert. granted and additional Question Presented added by the Court Jan. 7, 2011; SG as amicus, supporting Petitioner; argued on Oct. 31, 2011). The Questions Presented are as follows: (1) Contrary to *Hill v. Lockhart*, 474 U.S. 52 (1985)—which held that a defendant must allege that, but for counsel's error, the defendant would have gone to trial—can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms? (2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?**

Decided Mar. 21, 2012 (566 U.S. ___). Missouri Court of Appeals/Vacated and remanded. Justice Kennedy for a 5-4 Court (Scalia, J., dissenting, joined by Roberts, C.J., Thomas and Alito, JJ.). The Court held that the Sixth Amendment right to effective assistance of counsel "extends to the negotiation and consideration of plea offers that lapse or are rejected." Respondent Frye was charged with a class D felony after driving with a revoked license for the fourth time in the State of Missouri. His attorney failed to advise him of two subsequent plea offers, one of which would have reduced the charge to a misdemeanor with a recommended 90-day sentence, and the offers expired. After being arrested for a fifth time for driving with a revoked license shortly before his preliminary hearing, Frye pleaded guilty and was sentenced to three years in prison. He then filed for postconviction relief in state court alleging ineffective assistance of counsel. Noting the prevalence of plea bargains in both state and federal criminal justice systems, the Court held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused" under the Sixth Amendment. Applying the two part test under *Strickland*, the Court also held that defendants must make two showings in order to establish "prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance." First, "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." Second, "[d]efendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." The Court noted that, "given Frye's [fifth] offense for driving without a license . . . , there [was] reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it . . . , unless they were required by state law to do so." As such, the Court remanded the case to the Missouri Court of Appeals to address these state-law questions.

27. ***Sackett v. EPA*, No. 10-1062 (9th Cir., 622 F.3d 1139; cert. granted and Questions Presented reworded June 28, 2011; argued on Jan. 9, 2012). The Questions Presented are: (1) Whether Petitioners may seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. (2) If not, whether Petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violates their rights under the Due Process Clause.**

Decided Mar. 21, 2012 (566 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Scalia for a 9-0 Court. The Court held that federal courts have subject matter jurisdiction under the Administrative Procedure Act ("APA") to review compliance orders issued by the Environmental Protection Agency ("EPA") for violations of the Clean Water Act. The EPA's compliance orders require property owners to take certain actions with respect to their property and impose fines if that action is not taken. The Court determined that such orders have "all the hallmarks of APA finality," including that they place a legal obligation on the violators, and they reflect the "consummation" of the EPA's decisionmaking process. In addition, the Court concluded that the Clean Water Act did not preclude judicial review of compliance orders when there is not voluntary compliance and there is a substantial basis to question an order's validity. Accordingly, the Court remanded the case for judicial review of Petitioners' compliance order.

28. ***Martinez v. Ryan*, No. 10-1001 (9th Cir., 623 F.3d 731; cert. granted June 6, 2011; SG as amicus, supporting Respondent; argued on Oct. 4, 2011). Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first postconviction proceeding, has a federal constitutional right to effective assistance of first postconviction counsel specifically with respect to the ineffective-assistance-of-trial-counsel claim.**

Decided Mar. 20, 2012 (566 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for a 7-2 Court (Scalia, J. dissenting, joined by Thomas, J.). The Court held as a matter of equity that where state law requires a prisoner to raise claims of ineffective assistance of trial counsel for the first time in collateral proceedings, and a prisoner has failed to do so, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, (1) there was no counsel, or (2) counsel in that proceeding was ineffective." In so holding, the Court recognized a "narrow exception" to its decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that "negligence on the part of a prisoner's postconviction attorney does not qualify as cause" for a procedural default. The Court nonetheless declined to answer the constitutional question "whether a prisoner has a right to effective counsel" in initial-review collateral proceedings.

29. ***Mayo Collaborative Services v. Prometheus Laboratories, Inc*., No. 10-1150 (Fed. Cir., 628 F.3d 1347; cert. granted June 20, 2011; SG as amicus, supporting neither party; argued on Dec. 7, 2011). Whether 35 U.S.C. § 101 is satisfied by a patent claim that covers observed correlations between blood test results and patient health, so that the claim effectively preempts all uses of the naturally occurring correlations, simply because well-known methods used to administer prescription drugs and test blood may involve "transformations" of body chemistry.**

    Decided Mar. 20, 2012 (566 U.S. __). Federal Circuit/Reversed. Justice Breyer for 9-0 Court. The Court held that blood-testing processes used by doctors to determine the proper dosage levels for certain drugs were not patentable because the steps of the claimed processes simply reflected the interaction between natural law and well-understood methods, routinely used by other researchers in the field. As a general rule, the Court has held that laws of nature are not patentable, but that an *application* of such laws may be. *See Diamond v. Diehr*, 450 U.S. 175, 185-88 (1981). The Court determined, however, that a patent does not "apply" natural law if it merely defines the relevant audience of doctors and then instructs them to draw dosage conclusions based on the correlation between natural law and commonplace scientific measurements. Accordingly, the Court concluded that the patent claims at issue were invalid because the outlined steps did not "transform unpatentable natural correlations to patentable applications of those regularities."

30. ***Coleman v. Court of Appeals of Maryland*, No. 10-1016 (4th Cir., 626 F.3d 187; cert. granted June 27, 2011; argued on Jan. 11, 2012). Whether Congress constitutionally abrogated States' Eleventh Amendment immunity when it passed the self-care leave provision of the Family and Medical Leave Act.**

    Decided Mar. 20, 2012 (566 U.S. __). Fourth Circuit/Affirmed. Justice Kennedy for a 5-4 Court (Thomas, J., concurring, Scalia, J., concurring in the judgment, Ginsburg, J. dissenting, joined by Breyer, J., Sotomayor, J., Kagan, J.). A plurality of the Court held that Congress could not subject the States to suits for damages for violations of the self-care sick leave provision of The Family and Medical Leave Act of 1993 (the "FMLA"). Under Section 5 of the 14th Amendment, Congress may abrogate the States' sovereign immunity only "to enforce" the substantive guarantees of § 1 of the Amendment by "appropriate legislation." Unlike the FMLA provisions for leave for care of family members upheld in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the sick leave provision was not directed at an identified pattern of gender-based discrimination, and the legislative history demonstrated it was not "congruent and proportional" to any pattern of sex-based discrimination on the part of States. Therefore, the self-care leave provision exceeded Congress's authority to abrogate state sovereign immunity under the 14th Amendment. Justice Scalia concurred in the judgment only, arguing that the "congruent and proportional" test is a flabby analytic inviting judicial arbitrariness and policy-driven decision-making. He would limit Congress's Section 5 power to the regulation of conduct that itself violates the Fourteenth Amendment.

31. *Roberts v. Sea-Land Services*, No. 10-1399 (9th Cir., 625 F.3d 1204; cert. granted Sept. 27, 2011, limited to Question 1; argued on Jan. 11, 2012). The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("LHWCA") provides generally for compensation for total disability in periodic payments at a rate of two-thirds of the "average weekly wage of the injured employee at the time of the injury," and for most partial disabilities the same fraction of the difference between that weekly wage and the worker's residual "wage-earning capacity." *Id.* §§ 8-10, 33 U.S.C. §§ 908-10. But it has always imposed upper and lower limits on the rate payable as so determined. Section 6(b) of the Act, 33 U.S.C. § 906(b), provides that the compensation rate cannot be more than twice "the applicable national average weekly wage," as determined for each fiscal year; nor can compensation for total disability be less than the lesser of half the "applicable national average weekly wage" so determined and the worker's full preinjury earnings. The question which fiscal year's limits are the "applicable" ones is addressed by § 6(c): "Determinations under subsection (b)(3) of this section with respect to a [fiscal year] shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period." 33 U.S.C. § 906(c). The identity of the years whose limits are "applicable" under this provision has divided the two courts of appeals with the heaviest LHWCA dockets. The Question Presented is whether the phrase "those newly awarded compensation during such period" in LHWCA § 6(c), applicable to all classes of disability except permanent total, can be read to mean "those first entitled to compensation during such period," regardless of when it is awarded.

Decided Mar. 20, 2012 (566 U.S. ___). Ninth Circuit/Affirmed. Justice Sotomayor for an 8-1 Court (Ginsburg, J., concurring in part and dissenting in part). The Court held that an employee is "newly awarded compensation" in the year during which he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf. Rejecting the Petitioner's argument that "awarded compensation" means "awarded compensation in a formal order," the Court concluded that, in light of § 906(c)'s pivotal role in the Longshore and Harbor Workers' Compensation Act's ("LHWCA") comprehensive regime for awarding worker benefits, "awarded compensation" means "statutorily entitled to compensation because of disability." *See* 33 U.S.C. §§ 901-50. The Court offered three justifications for its conclusion. First, section 906(c)'s compensation cap applies in all LHWCA cases. Because the Act requires employers to pay benefits voluntarily, in the vast majority of cases no formal compensation order is ever entered. Under the Petitioner's interpretation, an employee receiving voluntary payments would not be subject to any maximum rate of compensation. This would render § 906(c) superfluous in all but a small handful of cases. Second, the Court explained, using the national average weekly wage for the fiscal year in which an employee becomes disabled coheres with the LHWCA's administrative structure. It allows employers to file the necessary certifications with the

Department of Labor. It harmonizes § 906(c) with § 910, which takes the employee's average weekly wage "at the time of the injury" as the basis for computing the employee's compensation. And it avoids the disparate treatment of similarly situated employees that would result from tying the rate of compensation to the happenstance of the date on which a compensation order issues. Third, the Court emphasized that using the national average weekly wage for the fiscal year in which disability commences discourages gamesmanship in the claims process by eliminating any incentive for an employee to delay or defer the entry of a compensation order.

32. ***Martel v. Clair*, No. 10-1265 (9th Cir., unpublished; cert. granted June 27, 2011; argued on Dec. 6, 2011)**. **Whether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence.**

Decided Mar. 5, 2012 (565 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kagan for a unanimous Court. The Court held that the "interests of justice" standard applies to motions for substitute counsel under 18 U.S.C. § 3599. Section 3599 "entitles indigent defendants to the appointment of counsel in capital cases, including habeas corpus proceedings," and "contemplates that appointed counsel may be 'replaced . . . upon motion of the defendant.'" The statute, however, "does not specify the standard that district courts should use in evaluating [such] motions." Based on the history of that provision, the Supreme Court found that courts should employ the "same 'interests of justice' standard that they apply in non-capital cases under a related statute, § 3006A of Title 18." The Court also explained that this standard best served the statutory goal of "improv[ing] the quality of representation afforded to capital petitioners and defendants alike." Respondent Clair filed a habeas petition challenging his conviction and death penalty sentence for the murder of a woman in 1984. Ten years later, Clair moved for appointment of new counsel. He later withdrew the request, only to renew his demand six weeks later. The district court denied his renewed motion and his habeas petition on the same day. Clair later moved to vacate the denial of his habeas petition, which the district court denied. On appeal, the Ninth Circuit vacated the district court's denial of Clair's substitution request and his habeas petition, holding that the "interests of justice" standard governed substitution motions and that the district court abused its discretion in denying Clair's request for new counsel. The Supreme Court granted certiorari and reversed, holding that the "District Court . . . did not abuse its discretion in denying Respondent Kenneth Clair's motion to change counsel" under the "interests of justice" standard. The Court held that "the timing of that motion preclude[d] a holding that the district court abused its discretion." After years of litigation, an evidentiary hearing, and post-hearing briefing, the court had instructed the parties that it would accept no further submissions. Furthermore, the district court had "received Clair's second letter while putting the finishing touches on its denial of his habeas petition." "[C]ounsel, whether old or new, could do nothing more in the trial court

proceedings," and therefore the "court was not required to appoint a new lawyer just so Clair could file a futile motion."

33. ***Kurns v. Railroad Friction Products Corp.*, No. 10-879 (3d Cir., 620 F.3d 392; cert. granted June 6, 2011; SG as amicus, supporting Petitioners; argued on Nov. 9, 2011). Whether Congress intended the Federal Railroad Safety Acts to preempt state law-based tort lawsuits.**

Decided Feb. 29, 2012 (565 U.S. ___). Third Circuit/Affirmed. Justice Thomas for a 6-3 Court (Kagan, J., concurring; Sotomayor, J., concurring in part and dissenting in part, joined by Ginsburg and Breyer, JJ.). The Court held that the Locomotive Inspection Act ("LIA") preempts state-law tort claims predicated on the design of locomotive parts and that the Federal Railroad Safety Act of 1970 did not alter the LIA's preemptive scope. George Corson filed suit against equipment manufacturers after developing malignant mesothelioma from the asbestos contained within locomotive parts Corson repaired. His claims asserted that the parts were defectively designed and that the manufacturers had failed to warn him of the dangers of asbestos. Under the Supreme Court's decision in *Napier v. Atlantic Coast Line R. Co.*, the LIA preempts "the entire field of regulating locomotive equipment." 272 U.S. 605, 611 (1926). The Court concluded that "*Napier* plainly encompasses the claims" brought by Corson because his "common-law claims for defective design and failure to warn [were] aimed at the equipment of locomotives." The Court rejected any distinction between Corson's negligent-design claims and his failure-to-warn claims because both were "directed at the equipment of locomotives." Because *Napier* held that the LIA preempts all state regulation of locomotive equipment, Corson's claims were preempted.

34. ***Douglas v. Independent Living Center of Southern California, Inc.*, No. 09-958; *Douglas v. California Pharmacists Association*, No. 09-1158; *Douglas v. Santa Rosa Memorial Hospital*, No. 10-283 (9th Cir., 572 F.3d 644, 596 F.3d 1098, 380 F. App'x 65; CVSG in No. 09-958 on May 24, 2010; cert. opposed in No. 09-958 on Dec. 3, 2010; cert. granted Jan. 18, 2011, limited to Question 1; cases consolidated Jan. 18, 2011; SG as amicus, supporting Petitioner; argued on Oct. 3, 2011). Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a State that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit concluded that this provision does not confer any "rights" on Medicaid providers or recipients that are enforceable under 42 U.S.C. § 1983, and Respondents do not contend otherwise. Nonetheless, in the present case, the Ninth Circuit held that § 1396a(a)(30)(A) preempted a state law reducing Medicaid reimbursement payments because the State failed to produce evidence that it had complied with requirements that do not appear in the**

text of the statute, and because the reductions were motivated by budgetary considerations. The Question Presented is as follows: Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates.

Decided Feb. 22, 2012 (565 U.S. ___). Ninth Circuit/Vacated and remanded. Justice Breyer for a 5-4 Court (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, JJ.). The Court held that the Ninth Circuit should determine, in the first instance, whether Medicaid providers and beneficiaries may challenge state Medicaid statutes under the Supremacy Clause when the federal agency that administers Medicaid, the Centers for Medicare & Medicaid Services ("CMS"), has approved the state Medicaid statutes as consistent with federal law. The Court granted certiorari to determine whether Medicaid providers and recipients may challenge state Medicaid statutes that reduce payments to providers under the Supremacy Clause, but, after certiorari was granted, CMS determined that the relevant state statutes comply with federal law. The Court observed that this development may require the Respondents to seek review of CMS's determination under the Administrative Procedure Act. Recognizing that the parties had not fully argued this question, and due to the complexity involved, the Court vacated the Ninth Circuit's judgments and remanded the cases to permit "the parties to argue the matter before that Circuit in the first instance."

35. ***Messerschmidt v. Millender*, No. 10-704 (9th Cir., 620 F.3d 1016; cert. granted June 27, 2011; SG as amicus, supporting Petitioners; argued on Dec. 5, 2011). The Questions Presented are: (1) Whether officers are entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her; a district attorney had approved the application; no factually on-point case law prohibited the search; and the alleged overbreadth in the warrant did not expand the scope of the search. (2) Whether *United States v. Leon*, 468 U.S. 897 (1984), and *Malley v. Briggs*, 475 U.S. 335 (1986), should be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good-faith conduct and improper exclusion of evidence in criminal cases.**

Decided Feb. 22, 2012 (565 U.S. ___). Ninth Circuit/Reversed. Chief Justice Roberts for a 6-1-2 Court (Breyer, J., concurring; Kagan, J., concurring in part and dissenting in part; Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that two police officers were entitled to qualified immunity from a § 1983 action that alleged that the officers had conducted an unreasonable search pursuant to an overbroad warrant in violation of the Fourth Amendment. Qualified immunity protects government officials from personal liability for allegedly unlawful official conduct if their actions were objectively reasonable in light of clearly established law at the time. In the context of unreasonable searches, the Court has recognized an exception to immunity, allowing suit when "it is obvious

that no reasonably competent officer would have concluded that a warrant should issue." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Here, the police officers were investigating an assault by a known gang member on his girlfriend during which the gang member repeatedly fired a sawed-off shotgun at her. The officers prepared a warrant to search the gang member's suspected residence for "[a]ny firearm capable of firing or chambered to fire any caliber ammunition" as well as any "[a]rticles of evidence showing street gang membership or affiliation with any Street Gang." The en banc Ninth Circuit held that the warrant was invalid and that the officers were not entitled to immunity because any reasonable officer would have recognized the warrant's overbroad scope in including *all* guns, beyond the one sawed-off shotgun, and allowing a search for gang material when the shooting was a domestic dispute. The Court disagreed and concluded that a reasonably competent officer could have believed that (1) the circumstances of the assault suggested that the gang member owned other guns besides the one sawed-off shotgun, and (2) evidence regarding the gang member's gang affiliation would prove helpful in prosecuting him for his assault on his girlfriend, which had been precipitated by her "calling the cops." The Court also noted that the fact that the warrant had been reviewed and approved by the officers' superiors and a deputy district attorney, in addition to the magistrate judge, did carry some weight in favor of the reasonableness of their belief that the warrant was supported by probable cause.

36. ***PPL Montana, LLC v. Montana*, No. 10-218 (Mont., 229 P.3d 421; CVSG Nov. 1, 2010; cert. opposed May 20, 2011; cert. granted June 20, 2011, limited to the first Question Presented; SG as amicus, supporting Petitioner; argued on Dec. 7, 2011). Whether the constitutional test for determining whether a section of a river is navigable for title purposes requires a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union, or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use.**

Decided Feb. 22, 2012 (565 U.S. ___). Mont./Reversed and remanded. Justice Kennedy for a 9-0 Court. The Court held that the Montana Supreme Court erred in concluding that the State of Montana held title to the portions of three riverbeds occupied by the Petitioner's hydroelectric facilities. Under the equal-footing doctrine, a State holds title within its borders to the beds of rivers and other waters that were navigable in fact at the time the State entered the Union. Rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). The Court concluded that the Montana Supreme Court committed two critical errors in applying the equal-footing doctrine. First, it considered the navigability of each river as a whole instead of on a segment-by-segment basis. "The segment-by-segment approach to navigability for title is well settled," the Court emphasized, "and it should not be disregarded." The lower court determined that the segment-by-segment approach is inapplicable to short interruptions of navigability in a stream otherwise navigable, so long as those short interruptions can be managed by way of an overland portage. The Court rejected

this determination, explaining that in most cases portages are sufficient to defeat a finding of navigability because they require transportation over land rather than over water. The Montana Supreme Court's second critical error was its reliance upon evidence of present-day recreational uses of one of the rivers to support its finding of navigability. This was error, the Court explained, not only because navigability must be assessed as of the time of statehood, but also because navigability concerns the river's usefulness for trade and travel rather than for other purposes. Although consideration of a river's contemporary noncommercial use is not *per se* erroneous, evidence of such use is relevant only if it is shown that there have not been material changes to either the watercraft being used and/or the physical condition of the river since the time of statehood. Montana had not made such a showing. Because these two errors required reversal of the judgment below, the Court did not reach the Petitioner's contention that the lower court had erred by not assigning the burden of proof to the State as the party seeking to establish navigability.

37. ***Howes v. Fields*, No. 10-680 (6th Cir., 617 F.3d 813; cert. granted Jan. 24, 2010; SG as amicus, supporting Petitioner; argued on Oct. 4, 2011). Whether this Court's clearly established precedent under 28 U.S.C. § 2254 holds that a prisoner is always "in custody" for purposes of the *Miranda* warning any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison.**

Decided Feb. 21, 2012 (565 U.S. ___). Sixth Circuit/Reversed. Justice Alito for a 6-3 Court (Ginsburg, J., concurring in part and dissenting in part, joined by Breyer and Sotomayor, JJ.) The Court held that its precedents did not establish a categorical rule "that the questioning of a prisoner is always custodial [within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966)] when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison." The Sixth Circuit therefore erred in granting federal habeas relief under AEDPA to a prisoner on the grounds that the state courts' refusal to suppress his confession—obtained in private, without *Miranda* warnings, and about an earlier crime—was contrary to "clearly established" federal law. The Court further held that such a categorical rule "is simply wrong," because its "three elements . . . —(1) imprisonment, (2) questioning in private, and (3) questioning about events in the outside world—are not necessarily enough to create a custodial situation for *Miranda* purposes." Under all the circumstances of the questioning, those elements were not sufficient to create a custodial situation here, where the prisoner "was told at the outset of the interrogation, and was reminded thereafter, that he could leave and go back to his cell whenever he wanted"; "was not physically restrained or threatened" and "was 'not uncomfortable'"; and "was offered food and water," with the "door to the conference room . . . sometimes left open."

38. ***Kawashima v. Holder*, No. 10-577 (9th Cir., 615 F.3d 1043; cert. granted May 23, 2011, limited to the first Question Presented; argued on Nov. 7, 2011). Whether the Ninth Circuit erred in holding that Petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a**

corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under 8 U.S.C. § 1101(a)(43)(M)(i), and that Petitioners were therefore removable.

Decided Feb. 21, 2012 (565 U.S. __). Ninth Circuit/Affirmed. Justice Thomas for a 6-3 Court (Ginsburg, J., dissenting, joined by Breyer and Kagan, JJ.). The Court held resident aliens convicted of certain federal tax crimes had committed an "aggravated felony" under 8 U.S.C. § 1101 *et seq.* and were therefore subject to deportation. An aggravated felony worthy of deportation is defined in § 1101(a)(43)(M) as a crime (i) "involv[ing] fraud or deceit . . ." in which the victim's loss exceeds $10,000 or (ii) relating to tax evasion under 26 U.S.C. § 7201 in which the revenue loss exceeds $10,000. The Court held a crime involving fraud or deceit need not require "fraud" or "deceit" as an explicit formal element for conviction. The Court employed a "categorical approach" that involved looking to the text of the statute defining the crime of conviction instead of to the specific facts of the underlying crime. Because willingly filing or assisting in filing a false tax return necessarily involves deceit, Petitioners' crimes were aggravated felonies under the statute. The Court rejected Petitioners' argument that sections (i) and (ii) were mutually exclusive: not all tax evasion involves fraud or deceit, and therefore tax crimes are not implicitly excluded from the broad category of crimes described in section (i). Further, the Court explained the U.S. Sentencing Guidelines' definition of "offenses involving fraud or deceit" was irrelevant, as there was no evidence Congress considered that definition in drafting § 1101.

39. ***Magner v. Gallagher*, No. 10-1032 (8th Cir., 619 F.3d 823; cert. granted Nov. 7, 2011; SG as amicus, supporting neither party; argument scheduled Feb. 29, 2012; petition dismissed pursuant to Rule 46 Feb. 14, 2012). The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Respondents are owners of rental properties who argue that Petitioners violated the Fair Housing Act by "aggressively" enforcing the City of Saint Paul's housing code. According to Respondents, because a disproportionate number of renters are African-American, and Respondents rent to many African-Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. Reversing the district court's grant of summary judgment for Petitioners, the Eighth Circuit held that Respondents should be allowed to proceed to trial because they presented sufficient evidence of a "disparate impact" on African-Americans. The Questions Presented are: (1) Whether disparate impact claims are cognizable under the Fair Housing Act. (2) If such claims are cognizable, whether they should be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test.**

Dismissed Feb. 14, 2012. The petition was dismissed pursuant to Rule 46.

40. *Reynolds v. United States*, No. 10-6549 (3d Cir., 380 F. App'x 125; cert. granted Jan. 24, 2010; argued on Oct. 3, 2011). The federal Sex Offender Registration and Notification Act ("SORNA") requires every sex offender to register in any State that has a sex-offender registration requirement—as all fifty States do. In 2007, the Attorney General issued a rule that the federal registration requirement would apply to all sex offenders, even if the offense occurred prior to SORNA's enactment. The Question Presented is: Whether the Petitioner, a convicted sex offender who pleaded guilty to failing to register, has standing under the plain reading of SORNA to challenge the Attorney General's registration rule.

Decided Jan. 23, 2012 (565 U.S. ___). Third Circuit/Reversed and remanded. Justice Breyer for a 7-2 Court (Scalia, J., dissenting, joined by Ginsburg, J.). The Court held that the federal Sex Offender Registration and Notification Act did not require sex offenders who had been convicted before the Act's enactment—so-called "pre-Act offenders"—to register before the Attorney General validly specified that the Act's registration provisions applied to them. Petitioner Reynolds, a pre-Act offender, was indicted for failing to meet the Act's registration requirements when he moved from Missouri to Pennsylvania. Reynolds challenged the indictment, arguing that the Act's registration requirements did not apply to him at the time because the Attorney General had failed to promulgate a valid rule specifying that the Act applied to pre-Act offenders. In doing so, Reynolds challenged the validity of the Attorney General's promulgation of an Interim Rule specifying the registration requirements' applicability to pre-Act offenders. The district court rejected the Petitioner's legal challenge to the Interim Rule, and the Third Circuit, without reaching the merits of this challenge, held that the Act's registration requirements instead applied to pre-Act offenders from the date of the law's enactment. The Court reversed based on the "natural reading of the textual language" of the Act. The Act provides that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter." The Court explained that this language is "more naturally read as conferring the authority [on the Attorney General] to *apply* the Act [to pre-Act offenders], not the authority to make exceptions," as the government argued. Therefore, the Court concluded that the Act did not apply to pre-Act offenders until the Attorney General so specified.

41. *United States v. Jones*, No. 10-1259 (D.C. Cir., 615 F.3d 544; cert. granted and additional Question Presented added by the Court June 27, 2011; argued on Nov. 8, 2011). The Questions Presented are: (1) Whether the warrantless use of a tracking device on Respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment. (2) Whether the government violated Respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.

Decided Jan. 23, 2012 (565 U.S. ___). D.C. Circuit/Affirmed. Justice Scalia authored the majority opinion for a Court that was 9-0 as to the judgment

(Sotomayor, J., concurring; Alito, J., concurring in the judgment, joined by Ginsburg, Breyer, and Kagan, JJ.). The Court held in this case that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" (footnote omitted). The Fourth Amendment recognizes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Court stated that a vehicle constituted an "effect" under that Amendment, and that "[t]he Government physically occupied private property for the purpose of obtaining information." The Court concluded that such actions would have been considered a "search" under the Fourth Amendment at the time of its adoption because they would have been considered a trespass upon an area enumerated by the Fourth Amendment. The majority's analysis was based on a property-based approach instead of the "reasonable expectation of privacy" standard from *Katz v. United States*, 389 U.S. 347 (1967). The majority explained that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." Finally, the Court noted that it was not resolving the Government's alternative argument that the attachment and use of the GPS device was a reasonable, and thus lawful, search.

42. ***National Meat Association v. Harris*, No. 10-224 (9th Cir., 599 F.3d 1093; CVSG Jan. 18, 2011; cert. opposed May 26, 2011; cert. granted June 27, 2011; SG as amicus, supporting Petitioner; argued on Nov. 9, 2011). The Questions Presented are: (1) Whether the Ninth Circuit erred in holding that a "presumption against preemption" requires a "narrow interpretation" of the Federal Meat Inspection Act's ("FMIA") express preemption provision, in conflict with the Court's decision in *Jones v. Rath Packing Co*., 430 U.S. 519 (1977), that the provision must be given "a broad meaning." (2) Whether, when federal food safety and humane handling regulations specify that animals (here, swine) which are or become nonambulatory on federally inspected premises are to be separated and held for observation and further disease inspection, the Ninth Circuit erred in holding that a state criminal law which requires that such animals not be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA. (3) Whether the Ninth Circuit erred in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally regulated slaughterhouses.**

Decided Jan. 23, 2012 (565 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kagan for a 9-0 Court. The Court held that the Federal Meat Inspection Act ("FMIA"), which regulates slaughterhouses to ensure both the safety of meat and the humane handling of animals, expressly preempted a California law dictating requirements for the treatment of nonambulatory pigs. The FMIA and its implementing regulations establish procedures for the inspection of each animal brought to a slaughterhouse. If an inspector determines that an animal is dead, dying, or afflicted with a serious disease or condition, he must designate the animal as "U.S. Condemned," the animal must be separately killed, and no part of

the carcass may be sold for human consumption. If the animal has a less severe condition, the inspector must classify the animal as "U.S. Suspect"—a classification that includes all nonambulatory animals not subject to condemnation. Suspect animals must be slaughtered separately, but parts of the carcass may be processed into food for humans after inspection. The FMIA also preempts all state laws "which are in addition to, or different than those made under" the FMIA. California's law bars slaughterhouses from buying, selling, or receiving a nonambulatory animal, bars them from selling meat from such an animal, and requires them to immediately euthanize the animal. In essence, the California law adds additional requirements for the treatment of nonambulatory animals not found in the federal scheme. The state law is therefore preempted by the FMIA.

43. ***Perry v. Perez*, No. 11-713; *Perry v. Davis*, No. 11-714; *Perry v. Perez*, No. 11-715 (W.D. Tex., unpublished; probable jurisdiction noted and cases consolidated Dec. 9, 2011; SG as amicus, supporting affirmance in part and vacatur in part; argued on Jan. 9, 2012). Whether the district court's redistricting plan is constitutional.**

Decided Jan. 20, 2012 (565 U.S. ___). W.D. Tex./Vacated and remanded. Per Curiam (Thomas, J., concurring in the judgment). The Court held that a district court should defer to a state's submitted redistricting plan except for those portions of it that do not have a reasonable probability of achieving preclearance under Section 5 of the Voting Rights Act. After the census, the State of Texas submitted its redistricting plan for preclearance, as required by Section 5 of the Voting Rights Act. While that process was pending, various plaintiffs challenged Texas's plan under the Constitution and Section 2 of the Voting Rights Act. Faced with an impending election and those two ongoing proceedings, a three-judge district court endeavored to draw an "independent" redistricting map, reasoning that it was not required to give any deference to Texas's plan. The Court held that the district court's determination was erroneous. The three-judge district court should have deferred to those portions of the State's plan that do not stand a reasonable probability of failing to gain preclearance. That is because of the need to avoid prejudging the merits of preclearance. Because it was unclear whether the three-judge district court followed the appropriate standard, the Court vacated the orders implementing the district court's maps and remanded for further proceedings.

44. ***Maples v. Thomas*, No. 10-63 (11th Cir., 586 F.3d 879; cert. granted Mar. 21, 2011, limited to Question 2; argued on Oct. 4, 2011). In this capital case, a state inmate missed a filing deadline, thereby procedurally defaulting for purposes of federal court review of his constitutional claims. The Question Presented is whether the Eleventh Circuit properly held that there was no "cause" to excuse any procedural default where Petitioner was blameless for the default, the State's own conduct contributed to the default, and Petitioner's attorneys of record were no longer functioning as his agents at the time of any default.**

Decided Jan. 18, 2012 (565 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Ginsburg for a 7-2 Court (Alito, J., concurring; Scalia, J., dissenting, joined by Thomas, J.). The Court held that a state postconviction attorney's abandonment of his prisoner-client without notice may constitute "cause" sufficient to overcome any procedural default resulting from the prisoner's unknowing deprivation of attorney representation. As a general rule, the Court held in *Coleman v. Thompson*, 501 U.S. 722 (1991), that negligence on the part of a prisoner's postconviction attorney is not "cause" to excuse noncompliance with state procedural rules because the attorney acts as the prisoner's agent. When the attorney severs the principal-agent relationship, however, the Court reasoned that he then no longer serves as the client's representative, and therefore the attorney's subsequent acts or omissions cannot be attributed to the client. Here, because Petitioner Maples's attorneys abandoned him before and during the critical time period for filing a state postconviction appeal without notifying Maples or seeking permission from the trial court to withdraw their representation, Maples had sufficiently demonstrated "cause" to excuse his failure to meet the deadline for filing a notice of appeal.

45. ***Golan v. Holder*, No. 10-545 (10th Cir., 609 F.3d 1076; cert. granted Mar. 7, 2011; argued on Oct. 5, 2011). Section 514 of the Uruguay Round Agreements Act of 1994 "restored" copyright protection in thousands of works that the Copyright Act had placed in the public domain, where they remained for years as the common property of all Americans. Petitioners are orchestra conductors, educators, performers, film archivists, and motion picture distributors, who relied for years on the free availability of these works in the public domain, which they performed, adapted, restored, and distributed without restriction. The enactment of Section 514 therefore had an effect on Petitioners' free speech and expression rights, as well as their economic interests. Section 514 eliminated Petitioners' right to perform, share, and build upon works they had once been able to use freely. The Questions Presented are the following: (1) Does the Copyright Clause of the United States Constitution prohibit Congress from taking works out of the public domain? (2) Does Section 514 violate the First Amendment?**

Decided Jan. 18, 2012 (565 U.S. ___). Tenth Circuit/Affirmed. Justice Ginsburg for a 6-2 Court (Breyer, J., dissenting, joined by Alito, J.; Kagan, J., took no part in the consideration or decision of this case). The Court held that § 514 of the Uruguay Round Agreements Act ("URAA") does not exceed Congress's authority under the Copyright Clause and that the First Amendment does not prohibit § 514's restoring to copyright works that had entered the public domain. Section 514 grants copyright protection to preexisting works of member countries to the Berne Convention for the Protection of Literary and Artistic Works, which were protected in their own countries but lacked U.S. protection for any of three reasons, including that the United States did not protect works from the country of origin at the time of publication. Some foreign works restored to copyright had entered the public domain in the United States. Petitioners, who had enjoyed free access to works that § 514 removed from the public domain, challenged § 514

under both the Copyright Clause and the First Amendment. Regarding the Copyright Clause challenge, the Court first observed that the "text of the Copyright Clause does not exclude application of copyright protection to works in the public domain." The Court highlighted its decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), which found that Congress did not violate the Copyright Clause by extending the terms of existing copyrights. Rejecting Petitioners' attempt to distinguish *Eldred* on the grounds that the "limited time" had already passed for works in the public domain, the Court observed that "a 'limited time' of exclusivity must begin before it may end" and that historical practice indicated that "[o]n occasion . . . Congress has seen fit to protect works once freely available." The Court also rejected Petitioners' claim that § 514 does not "promote the Progress of Science and useful Arts" because it deals solely with works already created, noting that "[n]othing in the text of the Copyright Clause confines the 'Progress of Science' exclusively to 'incentives for creation.'" Rejecting the claim that the First Amendment prohibits § 514's restoring to copyright works that had entered the public domain, the Court concluded that § 514 does not disturb the "traditional contours" of copyright protection—the "idea/expression dichotomy" and the "fair use" defense—and that "nothing in the historical record, congressional practice, or [the Court's] jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain."

46. ***Mims v. Arrow Financial Services, LLC,* No. 10-1195 (11th Cir., unpublished; cert. granted June 27, 2011; argued on Nov. 28, 2011). Whether Congress divested the federal district courts of their federal-question jurisdiction under 28 U.S.C. § 1331 over private actions brought under the Telephone Consumer Protection Act.**

Decided Jan. 18, 2012 (565 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court. The Court held that federal and state courts have concurrent jurisdiction over private suits arising under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Because federal law creates the right of action and provides the rule of decision in a private TCPA enforcement action, such an action arises under the laws of the United States within the meaning of 28 U.S.C. § 1331. The Court rejected the Petitioner's argument that the provision of the TCPA that authorizes a private citizen to bring an enforcement action in state court constitutes a grant to state courts of exclusive jurisdiction over such actions. There is a deeply rooted presumption of concurrent jurisdiction under § 1331, and the Court concluded that nothing in the language of the TCPA reflects an intention either to make the state courts' jurisdiction exclusive or to divest the federal courts of their general federal-question jurisdiction. Emphasizing that jurisdiction under § 1331 should not be displaced by a mere implication flowing from subsequent legislation, the Court rejected the Petitioner's remaining arguments, which pointed to the floor statements of the TCPA's sponsor and raised a policy concern over the federal courts being inundated by a flood of small-value TCPA claims, a concern the Court dismissed as "more imaginary than real."

47. ***Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, No. 10-553 (6th Cir., 597 F.3d 769; cert. granted Mar. 28, 2011; argued on Oct. 5, 2011). Whether the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions, applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.**

Decided Jan. 11, 2012 (565 U.S. ___). Sixth Circuit/Reversed. Chief Justice Roberts for a 9-0 Court (Thomas, J., concurring; Alito, J., concurring, joined by Kagan, J.). The Court held that a "ministerial exception," grounded in the Religion Clauses of the First Amendment, barred an employment discrimination suit brought against a religious church and school on behalf of a Lutheran minister. Respondent was a "called" teacher and a "commissioned minister" at a Lutheran primary school. After she fell ill, the school board asked for her resignation. When she refused to tender it and threatened to sue, the board terminated her employment. The EEOC brought suit against the school, alleging that Respondent was fired in retaliation for threatening to sue under the Americans with Disabilities Act ("ADA"); Respondent intervened and claimed unlawful retaliation under the ADA and Michigan law. The Court held that a "ministerial exception" barred such claims. Focusing on the primacy of religious institutions' "internal governance," the Court reasoned that "[t]he Establishment Clause [of the First Amendment] prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." Although it declined "to adopt a rigid formula for deciding when an employee qualifies as a minister," the Court held that Respondent did so qualify, emphasizing that she had "been ordained or commissioned as a minister" and had undertaken "significant religious training," with "a recognized religious mission underl[ying] the description of [her] position." That "lay" teachers performed similar duties, and that Respondent's "religious duties consumed only 45 minutes of each workday," were relevant to, but not dispositive of, the inquiry. Moreover, the suggestion that "Hosanna-Tabor's asserted religious reason for firing" Respondent was pretextual "misse[d] the point of the ministerial exception[,] . . . [which] ensures that the authority to select and control who will minister to the faithful . . . is the church's alone." Because the exception applied, the Court held that Respondent's case must be dismissed.

48. ***Pacific Operators Offshore, LLP v. Valladolid*, No. 10-507 (9th Cir., 604 F.3d 112; cert. granted Feb. 22, 2011; argued on Oct. 11, 2011). The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 ("OCSLA"), governs those who work on oil drilling platforms and other fixed structures beyond state maritime boundaries. Workers are eligible for compensation for "any injury occurring as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b) (2006). The Question Presented is the following: When an outer continental shelf worker is injured on land, is he (or his heir): (1) always eligible for compensation, because his employer's operations on the shelf are the but-for cause of his injury; (2) never eligible**

for compensation, because the Act applies only to injuries occurring on the shelf; or (3) sometimes eligible for compensation, because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the shelf?

Decided Jan. 11, 2012 (565 U.S. ___). Ninth Circuit/Affirmed and remanded. Justice Thomas for a 9-0 Court (Scalia, J., concurring in part and concurring in the judgment, joined by Alito, J.). The Court held that the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(b), extends coverage to an employee who can establish a substantial nexus between his injury and his employer's extractive operations on the outer continental shelf ("OCS"). The OCSLA extends the federal workers' compensation scheme established in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*., to injuries "occurring as the result of operations conducted on the outer Continental Shelf" for the purpose of extracting natural resources from the shelf, 43 U.S.C. § 1333(b). The widow of a Pacific Operators Offshore employee who worked on and off of the OCS sued for worker compensation benefits after the death of her husband during off-OCS maintenance activities. The Court rejected the argument by Pacific Operators Offshore that § 1333(b) of the OCSLA extends worker compensation benefits only to injuries sustained on the OCS. Similarly, the Court rejected the test proffered by the Fifth Circuit, which applied a "situs-of-injury" test, *see Mills v. Director, Office of Workers' Compensation Programs*, 877 F.2d 356 (5th Cir. 1989) (en banc); the view of the Third Circuit, which held that § 1333(b) extends to all injuries that would not have occurred "but for" operations on the OCS, *see Curtis v. Schlumberger Offshore Service, Inc*., 849 F.2d 805 (3d Cir. 1988); and the Solicitor General's argument that § 1333(b) should be construed to cover (1) on-OCS injuries suffered by employees of companies engaged in resource extraction on the OCS, and (2) off-OCS injuries of employees who spend a substantial portion of their time engaged in extractive operations on the OCS. Reasoning that the text of § 1333(b) demands only that extractive operations be "conducted on the [OCS]," and the employee's injury occur "as the result of" those operations, the Court adopted the Ninth Circuit's requirement that a claimant seeking worker compensation benefits under the OCSLA demonstrate a substantial nexus between his employer's extractive operations on the outer continental shelf and his injury. The Court noted that its reading of § 1333(b) was not foreclosed by *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), or *Offshore Logistics, Inc. v. Talentire*, 477 U.S. 207 (1986).

49. *Perry v. New Hampshire*, No. 10-8974 (N.H., unpublished; cert. granted May 31, 2011; SG as amicus, supporting Respondent; argued on Nov. 2, 2011). Whether the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, or only when the suggestive circumstances were orchestrated by the police.

Decided Jan. 11, 2012 (565 U.S. ___). Supreme Court of New Hampshire/Affirmed. Justice Ginsburg for an 8-1 Court (Thomas, J., concurring; Sotomayor, J., dissenting). The Court held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness

identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." Petitioner argued that trial judges should be required to prescreen all identifications made under suggestive circumstances because eyewitness identifications are uniquely unreliable. After examining its precedents, however, the Court indicated that it had only required such due process checks for reliability after a defendant had shown improper state action. The Court noted that a primary rationale for excluding identifications procured under unnecessarily suggestive circumstances is deterrence of police misconduct. Because the deterrence rationale is inapplicable in cases lacking improper police conduct and the reliability of evidence is typically within the jury's purview, the Court declined to "enlarge the domain of due process" in this case. In reaching its decision, the Court emphasized that there are multiple other safeguards of reliability applicable to criminal trials, including the presence of counsel at post-indictment line-ups, the right to confront and thoroughly cross-examine any eyewitnesses, the ability to object to introduction of prejudicial evidence under applicable evidentiary rules, and the opportunity to request a jury instruction related to the fallibility of eyewitness identifications.

50. *CompuCredit Corp. v. Greenwood*, No. 10-948 (9th Cir., 615 F.3d 1204; cert. granted May 2, 2011; argued on Oct. 11, 2011). Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are subject to arbitration pursuant to a valid arbitration agreement.

Decided Jan. 10, 2012 (565 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Scalia for an 8-1 Court (Sotomayor, J., concurring in the judgment, joined by Kagan, J.; Ginsburg, J., dissenting). The Court held that the Credit Repair Organizations Act ("CROA") did not preclude enforcement of an arbitration agreement in a lawsuit alleging violations of that Act. The Federal Arbitration Act ("FAA") requires courts to enforce agreements to arbitrate, even when the claims at issue are federal statutory claims, unless the FAA's mandate is overridden by a contrary congressional command. The CROA requires entities that offer services for the purpose of "improving any consumer's credit record, credit history, or credit rating" or "providing advice or assistance to any consumer with regard to any [such] activity or service" to provide its consumers with a written statement before any contract is executed. *See* 15 U.S.C. § 1679a(3). One sentence of this required disclosure reads, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id.* § 1679c(a). The CROA also treats as invalid any waiver by any consumer "of any protection provided by or any right of the consumer under this subchapter." *Id.* § 1679f(a). These provisions, according to the Court, do not convey to consumers a right to sue under the CROA in federal court that cannot be waived by an arbitration agreement. The disclosure provision grants to consumers only "the right to receive the statement, which is meant to describe the consumer protections that the law *elsewhere* provides." As a result, the nonwaiver provision protects only the consumer's right to receive the statement, not the right to sue in federal court. Because the CROA does not prohibit consumers from waiving any right to sue in federal court, an agreement to arbitrate claims arising under the CROA is enforceable.

51. *Minneci v. Pollard,* No. 10-1104 (9th Cir., 629 F.3d 843; cert. granted May 16, 2011; SG as amicus, supporting Petitioners; argued on Nov. 1, 2011). Whether the Court should imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government.

Decided Jan. 10, 2012 (565 U.S. ___). Ninth Circuit/Reversed. Justice Breyer for an 8-1 Court (Scalia, J., concurring, joined by Thomas, J.; Ginsburg, J., dissenting). The Court held that it could not "imply the existence of an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison" because "state law authorize[d] adequate alternative damages actions . . . that provided both significant deterrence and compensation." Respondent Pollard had sued several employees of a privately operated federal prison in federal court, claiming that these employees had deprived him of adequate medical care in violation of the Eighth Amendment's prohibition against "cruel and unusual" punishment. The district court dismissed Pollard's complaint after holding that the Eighth Amendment did not allow for a *Bivens* action against privately managed prison personnel, and the Ninth Circuit reversed on appeal. The Court reversed, concluding that Pollard could not assert a *Bivens* claim under the circumstances of this case. The Court explained that it had "primarily" reached its holding because "Pollard's Eighth Amendment claim focuse[d] upon a kind of conduct that typically falls within the scope of traditional state tort law." The Court also distinguished its prior decision in *Carlson v. Green*, 446 U.S. 14 (1980), where the Court implied a *Bivens* action under the Eighth Amendment against prison personnel at *government*-operated federal prisons, explaining that the "critical difference" was that the claims in *Carlson* sought damages from prison personnel employed by the government. While prisoners ordinarily can recover damages under state law from employees of a private firm, they ordinarily cannot do so against employees of the Federal Government. Under the Court's reasoning, it did not matter that Pollard's recovery under state tort law could be "less generous" than under a *Bivens* action, because the availability of a *Bivens* action turns instead on the question of "whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations." Because the Court found this standard to be satisfied here, it concluded that it could not imply a *Bivens* remedy.

52. *Gonzalez v. Thaler,* No. 10-895 (5th Cir., 623 F.3d 222; cert. granted June 13, 2011, limited to the following two questions; SG as amicus, supporting Respondent; argued on Nov. 2, 2011). The Questions Presented are: (1) Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate Petitioner's appeal? (2) Was the application for a writ of habeas corpus out of time under 28 U.S.C. § 2244(d)(1) due to "the

date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"?

Decided Jan. 10, 2012 (565 U.S. __). Fifth Circuit/Affirmed. Justice Sotomayor for an 8-1 Court (Scalia, J., dissenting). Interpreting two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Court held that 28 U.S.C. § 2253(c)(3) was a mandatory but nonjurisdictional rule. The Court also held that when a state habeas prisoner does not appeal to a State's highest court, a judgment becomes "final" under 28 U.S.C. § 2244(d)(1)(A) at the "expiration of the time for seeking such review." Section 2253(c)(1) of AEDPA requires a habeas prisoner to procure a certificate of appealability in order to appeal a district court's final order in a habeas proceeding. Section 2253(c)(3) states that a certificate of appealability "shall indicate which specific issue" satisfies the showing required by § 2253(c)(2), a "substantial showing of the denial of a constitutional right." Petitioner Gonzalez obtained a certificate of appealability from a Fifth Circuit judge, but the certificate failed to specifically "indicate" a constitutional issue. After Petitioner's subsequent unsuccessful appeal, and petition for a writ of certiorari to the Court, the State raised the argument that the Fifth Circuit lacked jurisdiction over Petitioner's appeal due to the § 2253(c)(3) defect. The Court applied a clear-statement principle, and determined that § 2253(c)(3) was not jurisdictional because it "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts." The Court noted that neighboring provisions' use of unambiguous jurisdictional terms indicated that Congress would have used clearer language in § 2253(c)(3) if it had meant for its indication requirement to be jurisdictional. The Court also emphasized that treating § 2253(c)(3) as jurisdictional "would thwart Congress' intent in AEDPA" to eliminate delays in the federal habeas review process. With regard to the interpretation of § 2244(d)(1)(A), that provision marks finality as "the conclusion of direct review or the expiration of the time for seeking such review." Clarifying previous precedent on the provision, the Court stated that the provision set out two prongs, each of which relates to a "distinct category of petitioners." For Petitioners who pursued direct review, a "final" judgment occurs at the "conclusion of direct review." For all other Petitioners, that is those who do not pursue direct review, the judgment is deemed "final" at the "expiration of the time for seeking such review." As the Petitioner in the instant case fell into the latter category, the Court found that Gonzalez's judgment became final "when his time for seeking review with the State's highest court expired." The Court rejected Gonzalez's definition of the "conclusion of direct review" as the date on which state law marked finality. The Court also rejected his alternative construction of § 2244(d)(1)(A) as allowing judges to calculate and select the later-in-time date of the two prongs.

53. ***Smith v. Cain*, No. 10-8145 (La., 45 So. 3d 1065; cert. granted June 13, 2011; argued on Nov. 8, 2011). In this case, the state trial and appellate courts denied Petitioner Juan Smith postconviction relief. Petitioner contends that the state courts reached this result only by disregarding firmly established Supreme Court precedent regarding the suppression of material evidence favorable to a defendant and the presentation of false or misleading evidence**

by a prosecutor. The Questions Presented are: (1) Whether there is a reasonable probability that the outcome of Smith's trial would have been different but for *Brady* and *Giglio*/*Napue* errors. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). (2) Whether the state courts violated the Due Process Clause by rejecting Smith's *Brady* and *Giglio*/*Napue* claims.

Decided Jan. 10, 2012 (565 U.S. ___). Criminal District of Louisiana, Orleans Parish/Reversed and remanded. Chief Justice Roberts for an 8-1 Court (Thomas, J., dissenting). The Court held that the Petitioner's murder conviction must be reversed because the prosecution failed to disclose an eyewitness's statements that were both favorable to the defense and material to the Petitioner's guilt. Under the Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), the state violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. In this case, the state did not dispute that the eyewitness's prior statements, which conflicted with the eyewitness's trial testimony identifying the Petitioner as a perpetrator in the crime, were favorable to the Petitioner and yet were not disclosed. Rejecting the state's argument that the statements were not material, the Court explained that evidence is "material" for purposes of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have differed. Although evidence impeaching an eyewitness may not be material if the state's other evidence is strong enough to sustain confidence in the verdict, the eyewitness's testimony in this case represented the only evidence that linked the Petitioner to the crime.

Gibson Dunn – Counsel for 39 Immigration Law Professors as Amici Curiae in Support of Petitioner

54. *Judulang v. Holder*, No. 10-694 (9th Cir., 249 F. App'x 499; cert. granted Apr. 18, 2011; argued on Oct. 12, 2011). For more than twenty-five years, the Board of Immigration Appeals ("BIA") held that a legal permanent resident ("LPR") who is deportable due to a criminal conviction could seek a discretionary waiver of removal under Section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), provided that the conviction also would have constituted a waivable basis for exclusion. In 2005, the BIA changed course, adding a requirement that the LPR be deportable under a statutory provision that used "similar language" to an exclusion provision. Deportable LPRs who departed and reentered the United States after their conviction, however, may seek Section 212(c) relief under a longstanding "nunc pro tunc" procedure that does not turn on similar language between deportation and exclusion provisions. Thus, under the BIA's current view, an LPR who pled guilty to an offense that renders him both deportable and excludable, but under provisions that use dissimilar phrasing, will be eligible for Section 212(c) relief from deportation if he departed and reentered the United States after his conviction, but ineligible if he did not depart. The Question Presented is whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did not depart and reenter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from

seeking discretionary relief from removal under former Section 212(c) of the INA.

Decided Dec. 12, 2011 (565 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kagan for a 9-0 Court. The Court held that the Board of Immigration Appeals' ("BIA") policy for deciding when resident aliens may apply to the Attorney General for relief from deportation under a now-repealed immigration law is arbitrary and capricious. The BIA determined whether an alien was eligible for discretionary relief from deportation based on whether the crime that served as the ground for deportation was comparable to one on the list of crimes that would render an alien excludable from the country. In the Court's view, that policy hinged eligibility for relief on a matter that is irrelevant to an alien's fitness to reside in the country—namely, the chance correspondence between statutory categories of crimes. That irrelevance, the Court concluded, rendered the BIA's policy arbitrary and capricious under the Administrative Procedure Act.

55. ***Greene v. Fisher*, No. 10-637 (3d Cir., 606 F.3d 85; cert. granted Apr. 4, 2011; argued on Oct. 11, 2011). For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is the temporal cutoff for whether a decision from the Court qualifies as "clearly established Federal law" under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?**

Decided Nov. 8, 2011 (565 U.S. ___). Third Circuit/Affirmed. Justice Scalia for a 9-0 Court. The Court held that "clearly established Federal law," for the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), includes decisions of the Supreme Court only as of the time of the relevant state-court adjudication on the merits, even if that adjudication precedes the date on which the defendant's conviction becomes final. Although finality marks the temporal cutoff for purposes of retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989), AEDPA is not strictly analogous to *Teague* retroactivity, and that decision cannot alter the plain meaning of the statute's text. Because Greene's direct appeal on the merits to the Pennsylvania Superior Court was adjudicated almost three months before the Court's decision in *Gray v. Maryland*, 523 U.S. 185 (1998), that ruling could not provide him grounds for habeas relief under AEDPA.

Pending Cases

1. ***First American Financial Corp. v. Edwards*, No. 10-708 (9th Cir., 610 F.3d 514; CVSG Feb. 28, 2011; cert. opposed May 19, 2011; cert. granted June 20, 2011, limited to the second Question Presented; argued on Nov. 28, 2011). Section 8(a) of the Real Estate Settlement Procedures Act of 1974 (the "Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C.**

§ 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2). Under the Act, a person seeking a monetary recovery need not show that the kickback arrangement affected the price, the quality, or any other characteristic of the settlement service. The Ninth Circuit held that an invasion of this statutory right by itself constitutes an injury for purposes of Article III standing, regardless of whether the plaintiff can demonstrate an additional harm resulting from the invasion of that right. The Question Presented is whether a private purchaser of real estate settlement services has standing to sue under Article III, § 2 of the United States Constitution.

2. ***Williams v. Illinois*, No. 10-8505 (Ill., 238 Ill. 2d 125; cert. granted June 28, 2011; SG as amicus, supporting Respondent; argued on Dec. 6, 2011). Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.**

3. ***Knox v. Service Employees International Union*, No. 10-1121 (9th Cir., 628 F.3d 1115; cert. granted June 27, 2011; argued on Jan. 10, 2012). The Questions Presented are: (1) Whether a State may, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a notice that includes information about that assessment and provides an opportunity to object to its exaction. (2) Whether a State may, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures.**

4. ***FCC v. Fox Television Stations*, No. 10-1293 (2d Cir., 613 F.3d 317; cert. granted and Question Presented reworded June 27, 2011; argued on Jan. 10, 2012). Whether the FCC's current indecency enforcement regime violates the First or Fifth Amendments to the United States Constitution.**

5. ***United States v. Alvarez*, No. 11-210 (9th Cir., 617 F.3d 1198; cert. granted Oct. 17, 2011; argued on Feb. 22, 2012). The Stolen Valor Act, 18 U.S.C. § 704(b), makes it a crime when anyone "falsely represents himself or herself, . . . verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." The Question Presented is whether the Stolen Valor Act is facially invalid under the Free Speech Clause of the First Amendment.**

6. ***Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (2d Cir., 621 F.3d 111; cert. granted Oct. 17, 2011, to be argued in tandem with *Mohamad v. Rajoub*, No. 11-88; SG as amicus, supporting Petitioners; argued on Feb. 28, 2012).**

Gibson Dunn – Counsel to NBC Universal Media LLP, et al.

The Questions Presented are: (1) Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question or an issue of subject matter jurisdiction. (2) Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or whether they may be sued in the same manner as any other private party defendant under the ATS. (3) Whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

Restored to calendar for reargument on March 5, 2012 with an additional question presented, namely, whether and under what circumstances the Alien Tort Statute allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. The *Kiobel* parties are to file their brief by May 3rd, with the oil companies involved due to file their response by June 4th. A reply brief is due by June 29th. Amici may file added briefs as dictated by Court rules.

7. ***Southern Union Co. v. United States*, No. 11-94 (1st Cir., 630 F.3d 17; cert. granted Nov. 28, 2011; argued on Mar. 19, 2012). Whether the Fifth and Sixth Amendment principles that this Court established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines.**

8. ***Miller v. Alabama*, No. 10-9646 (Ala., 63 So. 3d 676; cert. granted Nov. 7, 2011, to be argued in tandem with *Jackson v. Hobbs*, No. 10-9647; argued on Mar. 20, 2012). Evan Miller was sentenced to a mandatory sentence of life imprisonment without parole for a homicide offense committed when he was only fourteen years old. Evan is one of only seventy-three fourteen-year-olds nationwide who are serving such sentences. The Questions Presented are: (1) Whether imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children. (2) Whether imposition of a mandatory sentence of life imprisonment without parole on a fourteen-year-old child convicted of homicide—a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances—violates the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishments.**

9. ***Jackson v. Hobbs*, No. 10-9647 (Ark., 2011 Ark. 9; cert. granted Nov. 7, 2011, to be argued in tandem with *Miller v. Alabama*, No. 10-9646; argued on Mar. 20, 2012). Kuntrell Jackson has been sentenced to life imprisonment without the possibility of parole for an offense committed when he was fourteen years old. He is one of only 73 fourteen-year-olds serving such a sentence throughout the United States. His case presents an ideal vehicle for**

this Court's consideration of the question left undecided by *Graham v. Florida* and *Sullivan v. Florida*—whether the Eighth Amendment forbids a life-without-parole sentence for a young juvenile convicted of a homicide offense—because, while Kuntrell's offense did involve a homicide, he was convicted only on the theory that he was an accomplice to a robbery in which an older boy shot a shop attendant. Kuntrell himself did not commit the killing and was not shown to have had any intent or awareness that the attendant would be shot. The robbery "plan," such as it was, was spur-of-the-moment, formed just before the robbery, while Kuntrell, his cousin, and another older teen were walking together through a housing project. Because Arkansas law made a life-without-parole sentence mandatory upon Kuntrell's homicide conviction, neither his age nor any of these other mitigating circumstances could be considered by his sentencer. Under these circumstances, the Questions Presented are: (1) Whether imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children. (2) Whether such a sentence violates the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed. (3) Whether such a sentence violates the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances.

Gibson Dunn – Counsel for Former U.S. Department of Justice Officials as Amici Curiae in Support of Respondents

10. ***Department of Health and Human Services v. Florida*, No. 11-398 (11th Cir., 648 F.3d 1235; cert. granted Nov. 14, 2011, limited to Question 1 and additional Question Presented; additional Question Presented argued on Mar. 26, 2012; Question 1 argued on Mar. 27, 2012). Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. § 5000A. The Questions Presented are: (1) Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision. (2) Whether the suit brought by Respondents to challenge the minimum coverage provisions of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(A).**

11. ***National Federation of Independent Business v. Sebelius*, No. 11-393 (11th Cir., 648 F.3d 1235; cert. granted Nov. 14, 2011; consolidated for argument with respect to Question 3 of No. 11-400; argued on Mar. 28, 2012). Congress effected a sweeping and comprehensive restructuring of the Nation's health-insurance markets in the Patient Protection and Affordable Care Act, Pub. L.**

No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the "ACA" or "Act"). But the Eleventh Circuit and the Sixth Circuit now have issued directly conflicting final judgments about the facial constitutionality of the ACA's mandate that virtually every individual American must obtain health insurance. 26 U.S.C. § 5000A. Moreover, despite the fact that the mandate is a "requirement" that Congress itself deemed "essential" to the Act's new insurance regulations, 42 U.S.C. § 18091(a)(2)(I), the Eleventh Circuit held that the mandate is severable from the remainder of the Act. The Question Presented is whether the ACA must be invalidated in its entirety because it is non-severable from the individual mandate that exceeds Congress's limited and enumerated powers under the Constitution.

12. ***Florida v. Department of Health and Human Services*, No. 11-400 (11th Cir., 648 F.3d 1235; cert. granted Nov. 14, 2011, limited to Questions 1 and 3; consolidated with No. 11-393 with respect to Question 3; argued on Mar. 28, 2012). The Questions Presented are: (1) Whether Congress exceeds its enumerated powers and violates basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress's spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply. (2) Whether the Affordable Care Act's mandate that virtually every individual obtain health insurance exceeds Congress's enumerated powers and, if so, to what extent (if any) the mandate can be severed from the remainder of the Act.**

13. ***Christopher v. SmithKline Beecham Corp*., No. 11-204 (9th Cir., 635 F.3d 383; cert. granted Nov. 28, 2011; SG as amicus, supporting Petitioners; SG granted argument time on Apr. 2, 2012; argued on Apr. 16, 2012). The outside sales exemption of the Fair Labor Standards Act exempts from the overtime requirements of the Act "any employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .)." 29 U.S.C. § 213(a)(1). The Secretary of Labor has implemented various regulations that "define and delimit" the outside sales exemption and, filing as *amici* in this and other related matters, has interpreted these regulations to find the exemption inapplicable to pharmaceutical sales representatives. A split exists between the Second and Ninth Circuits concerning whether this interpretation is owed deference and whether the outside sales exemption of the Fair Labor Standards Act applies to pharmaceutical sales representatives. The Questions Presented are: (1) Whether deference is owed to the Secretary's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations. (2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.**

14. ***Dorsey v. United States*, No. 11-5683; *Hill v. United States*, No. 11-5721 (7th Cir., 635 F.3d 336, 417 F. App'x 560; cert. granted Nov. 28, 2011; cases consolidated Nov. 28, 2011; argued on Apr. 17, 2012). The Fair Sentencing Act of 2010 lowered the penalties for certain cocaine-base offenses by increasing the threshold quantities of cocaine base that trigger certain mandatory-minimum sentences. The Seventh Circuit held that the Act applies only to offenses committed after its enactment. The Question Presented is whether the Seventh Circuit erred when, in conflict with the First and Eleventh Circuits, it held that the Act does not apply to all defendants sentenced after its enactment, regardless of when the offense was committed.**

15. ***Salazar v. Ramah Navajo Chapter*, No. 11-551 (10th Cir., 644 F.3d 1054; cert. granted Jan. 6, 2012; argued on Apr. 18, 2012). Whether the government is required to pay all of the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq*., where Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap.**

16. ***Match-E-Be-Nash-She-Wish Band v. Patchak*, No. 11-246; *Salazar v. Patchak*, No. 11-247 (D.C. Cir., 632 F.3d 702; cert. granted and cases consolidated Dec. 12, 2011; argued on Apr. 24, 2012). The Questions Presented are: (1) Whether 5 U.S.C. § 702 waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian Tribe. (2) Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.**

17. ***Arizona v. United States*, No. 11-182 (9th Cir., 641 F.3d 339; cert. granted Dec. 12, 2011; argued on Apr. 25, 2012). Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration crisis in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements. The Question Presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.**

October Term 2012

1. ***Florida v. Jardines*, No. 11-564 (Fl., 73 So. 3d 34; cert. granted Jan. 6, 2012, limited to Question 1; SG as amicus, supporting Petitioner). Whether a dog**

sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

2. ***Kloeckner v. Solis*, No. 11-184 (8th Cir., 639 F.3d 834; cert. granted Jan. 13, 2012). The Merit Systems Protection Board is authorized to hear appeals by federal employees regarding certain adverse actions, such as dismissals. If in such an appeal the employee asserts that the challenged action was the result of unlawful discrimination, that claim is referred to as a "mixed case." The Question Presented is: If the Board decides a mixed case without determining the merits of the discrimination claim, whether the court with jurisdiction over that claim is the Court of Appeals for the Federal Circuit or a district court.**

3. ***United States v. Bormes*, No. 11-192 (Fed. Cir., 626 F.3d 574; cert. granted Jan. 13, 2012). Whether the Little Tucker Act, 28 U.S.C. § 1346(a)(2), waives the sovereign immunity of the United States with respect to damages actions for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*.**

4. ***Cavazos v. Williams*, No. 11-465 (9th Cir., 646 F.3d 636; cert. granted Jan. 13, 2012, limited to Question 1). Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.**

Gibson Dunn – Co-Counsel for University of Texas at Austin

5. ***Fisher v. University of Texas at Austin*, No. 11-345 (5th Cir., 631 F.3d 213; cert. granted Feb. 21, 2012). Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.**

6. ***Lozman v. Riviera Beach*, No. 11-626 (11th Cir., 649 F.3d 1259; cert. granted Feb. 21, 2012; SG as amicus, supporting Petitioner). Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.**

7. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011; cert. opposed Feb. 9, 2012; cert. granted Mar. 19, 2012). Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys," entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel.**

8. ***Tibbals v. Carter*, No. 11-218 (6th Cir., 644 F.3d 329; cert. granted Mar. 19, 2012). (1) Whether capital prisoners have a right to competence in habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966). (2) Whether a court can order an indefinite stay of habeas proceedings under *Rees*.**

9. ***Florida v. Harris*, No. 11-817 (Supreme Court of Florida, 71 So. 3d 756; cert. granted Mar. 26, 2012). Whether an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle.**

10. ***Moncrieffe v. Holder*, No. 11-702 (5th Cir., 662 F.3d 387; cert. granted Apr. 2, 2012). Whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal law felony.**

11. ***Arkansas Game & Fish Commission v. United States*, No. 11-597 (Fed. Cir., 637 F.3d 1366; cert. granted Apr. 2, 2012). Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.**

Gibson Dunn – Counsel for John Wiley & Sons, Inc.

12. ***Supap Kirtsaeng, dba Bluechristine99 v. John Wiley & Sons, Inc.*, No. 11-697 (2d Cir., 654 F.3d 210; cert. granted Apr. 16, 2012). How do Section 602(a)(1) of the Copyright Act, which makes it impermissible to import a work "without the authority of the owner" of the copyright, and Section 109(a), which allows the owner of a copy "lawfully made under this title" to sell or otherwise dispose of the copy without the copyright owner's permission, apply to a copy that was made and legally acquired abroad and then imported into the United States? Can such a foreign-made product never be resold in the United States without the copyright owner's permission; sometimes be resold within the United States without permission, but only after the owner approves an earlier sale in the United States; or always be resold without permission within the United States, so long as the copyright owner authorized the first sale abroad?**

13. ***Roselva Chaidez v. United States*, No. 11-820 (7th Cir., 655 F.3d 684; cert. granted Apr. 30, 2012). Whether *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in which the Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation, apply to persons whose convictions became final before its announcement.**

14. ***Clapper v. Amnesty Int'l USA*, No. 11-1025 (2d Cir., 638 F.3d 118; cert. granted May 21, 2012). Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance under Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a (Supp. II 2008), and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.**

15. ***Marx v. General Revenue Corp.*, No. 11-1175 (10th Cir., 668 F.3d 1174; cert. granted May 29, 2012). Whether a prevailing defendant in a case under the Fair Debt Collection Practices Act ("FDCPA") may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment" under 15 U.S.C. § 1692k(a)(3).**

16. ***Bailey v. United States*, No. 11-770 (2d Cir., 652 F.2d 197; cert. granted June 4, 2012). Whether, pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.**

17. ***Evans v. Michigan*, No. 11-1327 (Mich. Sup. Ct.; 491 Mich. 1; cert. granted June 11, 2012). Whether the Double Jeopardy Clause of the U.S. Constitution bars retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a mistrial directed verdict of acquittal because the prosecution failed to prove that fact.**

18. ***Amgen, Inc. v. Connecticut Retirement Plan*, No. 11-1085 (9th Cir.; 660 F.3d 1170; cert. granted June 11, 2012). (1) Whether, in a misrepresentation case under SEC Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory. (2) Whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.**

Cases Determined Without Argument

1. ***Cavazos v. Smith*, No. 10-1115 (9th Cir., 624 F.3d 1235; cert. granted Oct. 31, 2011; reversed and remanded Oct. 31, 2011).** Per Curiam (Ginsburg, J., dissenting, joined by Breyer and Sotomayor, JJ.). The Court held that, in reviewing a state-court criminal conviction, a federal court must defer to the state court's resolution of conflicting evidence. A California jury convicted Shirley Ree Smith of assault on a child resulting in death, concluding that she had shaken her grandson to death. The Ninth Circuit determined that no rational jury could have convicted Smith and set the jury verdict aside. The Court reversed, holding that conflicting evidence was insufficient for a federal court to overturn a state-court conviction. Instead, the reviewing federal court must assume that the trier of fact resolved conflicting evidence in favor of the prosecution. The Court examined the conflicting evidence and concluded that, while there could be room for doubt, the jury's conclusion was supported by some evidence and therefore the Ninth Circuit erred in setting aside the state court's judgment.

2. ***KPMG LLP v. Cocchi*, No. 10-1521 (Fl. Ct. of App., 51 So. 3d 1165; cert. granted Nov. 7, 2011; vacated and remanded Nov. 7, 2011).** Per Curiam. The Court held that state and federal courts must examine each claim in multiple claim lawsuits "in order to separate arbitrable from nonarbitrable claims" under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Citing *Dean Witter Reynolds Inc. v.*

Byrd, 470 U.S. 213, 217 (1985), the Court explained that the Federal Arbitration Act requires that all arbitrable claims in multiple claim lawsuits be sent to arbitration "even if this will lead to piecemeal litigation." Therefore, the Court of Appeal erred in upholding the trial court's "blanket refusal" to compel arbitration of Respondents' claims after determining that only two of the four claims in the complaint were nonarbitrable.

3. ***Bobby v. Dixon*, No. 10-1540 (6th Cir., 627 F.3d 553; cert. granted Nov. 7, 2011; reversed and remanded Nov. 7, 2011).** Per Curiam. The Court held that the Sixth Circuit erroneously granted habeas relief to a convicted murderer under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, a federal court may only grant an application for a writ of habeas corpus to a state prisoner if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Dixon was convicted of murder after an Ohio state court refused to exclude his confession to the murder charge taken after he was arrested and questioned on separate forgery charges. The court excluded Dixon's confession to the forgery charges because the police failed to provide him with the required warning under *Miranda v. Arizona*, 384 U.S. 436 (1966). The Ohio Supreme Court affirmed the conviction, holding that Dixon's confession to the murder charges, given after a proper *Miranda* warning, was admissible because both confessions were given voluntarily. Under the court's reasoning, the prior, unwarned confession to forgery did not require exclusion of the later, warned confession to murder. On habeas review, a federal district court denied relief. The Sixth Circuit reversed, holding that the police interrogation constituted a "deliberate question-first, warn-later strategy" in violation of Dixon's constitutional rights. The Court disagreed, holding that it was "not clear that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision."

4. ***Hardy v. Cross*, No. 11-74 (7th Cir., 632 F.3d 356; cert. granted Dec. 12, 2011; reversed Dec. 12, 2011).** Per Curiam. The Court held that the Seventh Circuit erroneously granted habeas relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). In the Court's view, the Illinois Court of Appeals reasonably concluded that state prosecutors conducted the good-faith search for a witness that is required under the Confrontation Clause before that witness is declared unavailable and her prior testimony is read into a subsequent trial. That the federal court identified additional steps that might have been taken was insufficient under AEDPA's deferential standard of review, especially because those steps in this case were not likely to have been successful.

5. ***Ryburn v. Huff*, No. 11-208 (9th Cir., 632 F.3d 539; cert. granted Jan. 23, 2012; reversed Jan. 23, 2012).** Per Curiam. The Court held that police officers who entered a house when investigating rumors of a threatened school shooting were entitled to qualified immunity. Respondents brought a § 1983 action against the police officers, alleging that the officers violated Respondents' Fourth Amendment rights by entering their home without obtaining a warrant. According to the Court, a "reasonable police officer could read [the Court's] decisions to

mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence." In this case, in which an individual immediately turned and ran into her house when the officers asked whether there were guns inside, the Court explained that reasonable officers "could have come to the conclusion that there was an imminent threat to their safety and to the safety of others."

6. ***Wetzel v. Lambert,* No. 11-38 (3d Cir., 633 F.3d 126; cert. granted Feb. 21, 2012; vacated and remanded Feb. 21, 2012).** Per Curiam (Breyer, J., dissenting, joined by Ginsburg and Kagan, JJ.). The Court held that AEDPA required the Court of Appeals to address and find unreasonable each ground supporting the state's post-conviction decision before granting Petitioner's habeas petition. James Lambert was convicted of first degree murder, robbery, conspiracy, and related offenses, and was sentenced to death. Almost twenty years after his conviction, he sought post-conviction relief, claiming a *Brady* violation because of the prosecution's failure to disclose a police activity sheet. The state courts denied his request for post-conviction relief, finding that the police activity sheet was ambiguous and immaterial as an impeachment device because the witness referenced in the activity sheet was repeatedly impeached at trial. Following the denial of post-conviction relief by the state courts, Lambert filed a federal habeas petition. The Third Circuit concluded that it was "patently unreasonable" for the Pennsylvania Supreme Court to presume that whenever a witness is impeached in one manner, any other impeachment evidence would be immaterial. The Court held that the Third Circuit erred by failing to consider the state supreme court's determination that the activity sheet was ambiguous. The Court noted that the Third Circuit may have been correct in its determination that failure to disclose the police activity sheet was a *Brady* violation, but the Third Circuit erred by failing to evaluate all of the grounds considered by the state court. The Court stated that the burden of retrial "should not be imposed unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA."

7. ***Marmet Health Care Center, Inc. v. Brown,* No. 11-391; *Clarksburg Nursing Home & Rehabilitation Center, LLC v. Marchio,* No. 11-394 (W.V., _ S.E.2d _, 2011 WL 2611327; cert. granted Feb. 21, 2012; vacated and remanded Feb. 21, 2012).** Per Curiam. The Court held that West Virginia's "prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage" of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. In the appealed decision, related to three negligence suits against nursing homes, the Supreme Court of Appeals for West Virginia held that it was against the public policy of West Virginia to enforce arbitration clauses in nursing home admission agreements that were adopted prior to negligent acts that lead to patient injuries or deaths. In considering whether the FAA preempted such a state policy, the West Virginia court explicitly disagreed with the Supreme Court's interpretation of the FAA, calling it "tendentious" and "created from whole cloth." Stating that Congress did not intend for the FAA to apply to personal injury cases, the West Virginia court found that the FAA did not preempt a public policy prohibiting enforcement of the

arbitration clauses at issue in the instant cases. On appeal, the Court found that the West Virginia court's interpretation of the FAA was "both incorrect and inconsistent with clear instruction in the precedents of this Court." The Court reminded the Supreme Court of Appeals for West Virginia that when the Court has interpreted federal law, a state court may not fail to follow the rule so established. Noting the federal policy favoring arbitration, the Court found that the text of the FAA does not provide an exception for claims based on personal injury or wrongful death. Citing its precedents, the Court reiterated that the FAA displaces any state law that bans outright the arbitration of particular classes of claims. Accordingly, the Court vacated the West Virginia court's judgment and remanded the case with instructions for it to consider whether the arbitration clauses in two of the cases were unenforceable for reasons not preempted by the FAA.

8. ***Coleman v. Johnson*, No. 11-1053 (3d Cir., 446 F. App'x 531; cert. granted May 29, 2012; reversed and remanded May 29, 2012)**. Per Curiam. Respondent Lorenzo Johnson was convicted as an accomplice and a co-conspirator in a 1995 murder in Harrisburg, Pennsylvania. After exhausting his state court remedies, Johnson sought federal habeas relief, arguing that the evidence was insufficient under the Due Process Clause to support his conviction. The district court denied habeas relief, and the Third Circuit reversed, "holding that the evidence at trial was insufficient . . . under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979)." "Affording due respect to the role of the jury and the state courts," the Supreme Court reversed, concluding that the "evidence was sufficient to convict Johnson . . . ." The Court explained that "*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." First, "[a] reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, ___ (2011) (*per curium*) (slip op., at 1). Second, under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, a federal court must give "considerable deference" to the state court decisions regarding the sufficiency of evidence. As such, a federal court may disturb a jury's verdict on the ground of insufficient evidence only if the jury's "finding was so insupportable as to fall below the threshold of bare rationality." Applying this standard, the Supreme Court held that "the evidence at Johnson's trial was not nearly sparse enough to sustain a due process challenge under *Jackson*."

9. ***Parker v. Matthews*, No. 11-845 (6th Cir., 651 F.3d 489; cert. granted June 11, 2012; reversed and remanded June 11, 2012)**. Per Curiam. Respondent David Eugene Matthews was convicted of murder in connection with the killing of his wife and mother-in-law in 1981 in Louisville, Kentucky. The Court held that the Sixth Circuit had no authority to issue a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The Court found both of the Sixth Circuit's two arguments justifying relief under 28 U.S.C. § 2254(d) invalid. It first concluded that the Kentucky Supreme Court did not impermissibly shift the burden of proving extreme emotional disturbance to Matthews when it denied his sufficiency-of-the-evidence claim. Though the Kentucky Supreme Court invoked a questionable standard of review, it also

rejected the evidentiary claim on other, sufficient grounds. Second, the Court found that the prosecutor's closing statement describing the likely thought processes of the defendant, his attorney, and his psychiatrist about how to mount an effective defense did not infect the trial with so much unfairness as to make the defendant's conviction a due process violation under the standard set forth in *Darden v. Wainwright*, 477 U.S. 168 (1986). After noting that the Sixth Circuit inappropriately applied its own test in lieu of the *Darden* standard, the Court concluded that the prosecutor's closing statement did not allege collusion between the defendant, his attorney, and his psychiatrist and consequently did not constitute a due process violation.

Pending Cases Calling For The Views Of The Solicitor General

1. ***Am. Trucking Ass'n, Inc. v. Los Angeles*, No. 11-798 (9th Cir., 660 F.3d 384; CVSG Mar. 26, 2012). The Questions Presented are: (1) Whether 49 U.S.C. § 14501(c)(1), which provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," contains an unexpressed "market participant" exception and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services. (2) Whether a required concession agreement setting out various conditions a motor carrier must meet to serve a particular port imposes any requirements that are "related to a price, route, or service of any motor carrier" for the purposes of preemption under Section 14501(c)(1). (3) Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle v. Hayes Freight Lines Inc.*, 348 U.S. 61 (1954).**

2. ***Tarrant Regional Water District v. Herrmann*, No. 11-889 (10th Cir., 656 F.3d 1222; CVSG Apr. 2, 2012). (1) Whether Congress's approval of an interstate water compact that grants the contracting states "equal rights" to certain surface water and—using language present in almost all such compacts—provides that the compact shall not "be deemed . . . to interfere" with each state's "appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact," manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water. (2) Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.**

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***John Crane, Inc. v. Atwell*, No. 10-272 (Pa. Super. Ct., 986 A.2d 888, *appeal denied*, 996 A.2d 490; CVSG Nov. 1, 2010; cert. supported May 6, 2011; cert granted, vacated, and remanded in light of *Kurns v. Railroad Friction Prods. Corp.*, 565 U.S. ____ (2012), Mar. 5, 2012). The Question Presented is whether a federal law, the Boiler Inspection Act, 49 U.S.C. § 20701, preempts the field of locomotive equipment regulation and thus bars state tort claims based on a railroad worker's death from lung cancer following prolonged exposure to asbestos while working as a locomotive repairman.**

2. ***Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, No. 10-844 (Fed. Cir., 601 F.3d 1359; CVSG Mar. 28, 2011; cert. supported May 26, 2011; cert. granted June 27, 2011; SG as amicus, supporting Petitioners; argued on Dec. 5, 2011). When the Food & Drug Administration ("FDA") approves a drug for multiple uses, the Hatch-Waxman Act (the "Act") allows generic drug makers to avoid contested patent litigation by marketing generic versions of the drug solely for non-patented uses. According to Petitioners, the FDA defers to name-brand drug companies' 140-character descriptions of the scope of their method of use patents, and such companies can therefore block the approval of generic drugs by submitting overbroad patent method of use descriptions to the FDA. The Act allows a "counterclaim seeking an order requiring the [patent] holder to correct or delete the patent information submitted by the holder . . . on the ground that the patent does not claim . . . an approved method of using the drug." 21 U.S.C. § 355(j)(5)(C)(ii)(I). The Question Presented is whether the Act's counterclaim provision applies where (1) there is "an approved method of using the drug" that "the patent does not claim," and (2) the brand submits "patent information" to the FDA that misstates the patent's scope, requiring "correct[ion]."**

   Decided Apr. 17, 2012 (566 U.S. __). Federal Circuit/Reversed and remanded. Justice Kagan for a 9-0 Court (Sotomayor, J., concurring). The case involves the scope of a statutory provision that allows a generic drug manufacturer to "assert a counterclaim seeking an order requiring the [brand] to correct or delete the patent information submitted by the [brand]" to the FDA "on the ground that the patent does not claim . . . an approved method of using the drug." 21 U.S.C. § 355(h)(5)(C)(ii)(I). A drug manufacturer produced a diabetes drug that was approved for three uses by the FDA. The drug manufacturer's patent only covered one of the three uses, but it submitted a "summary" of its patent to the FDA that included all three approved uses. Because the FDA cannot authorize a generic drug that would infringe a brand manufacturer's patent, the drug manufacturer's erroneous summary barred a generic manufacturer from marketing a generic version of the drug that covered the unpatented uses. Accordingly, the generic manufacturer filed suit under Section 355, seeking to "correct" the brand manufacturer's description of its patent. The district court granted summary judgment to the generic company, but the Federal Circuit reversed, holding that a

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generic manufacturer can prevail under Section 355 only if it can prove that the branded manufacturer's patent does not extend to "any" approved method of use. The Court rejected the Federal Circuit's interpretation, construing section 355 to permit a generic manufacturer to prevail under Section 355 where the drug manufacturer's patent summary does not include any covered use, and where the patent summary misdescribes the patent's scope.

3. ***Freeman v. Quicken Loans, Inc.*, No. 10-1042 (5th Cir., 626 F.3d 799; CVSG May 16, 2011; cert. supported Aug. 25, 2011; cert. granted Oct. 11, 2011; SG as amicus, supporting Petitioners; argued on Feb. 21, 2012). Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b), provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." The Question Presented is whether Section 8(b) of RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.**

Decided May 24, 2012 (566 U.S. ___). Fifth Circuit/Affirmed. Justice Scalia for a 9-0 Court. The Court held that a plaintiff must show that a charge for settlement services was divided between two or more persons to establish a violation of Section 2607(b) of the Real Estate Settlement Procedures Act. Section 2607(b) provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." The Petitioners, who had obtained mortgage loans from the Respondent, alleged that the Respondent violated Section 2607(b) by charging them fees for which no services were provided. In finding that this provision does not prohibit collection of unearned fees by a single settlement-service provider, as opposed to transactions in which a portion of a fee is shared with other persons who did not earn the fee, the Court observed that Section 2607(b) describes two transactions. Under this provision, a charge is "made" to or "received" from a consumer by a settlement-service provider, and the provider then "give[s]," and another person "accept[s]," a "portion, split, or percentage" of the charge. The Court reasoned that this distinction "would be pointless if . . . the two transactions could be collapsed into one," such that a single settlement-service provider could both "ma[k]e" a charge and then "accept" all of it. The Court was not persuaded by the Petitioners' argument that the consumer is the one who "give[s]" a "portion, split, or percentage" of the fee to the settlement-service provider who "accept[s]" it, observing that this reading would render the consumer a lawbreaker under the statute. Moreover, the Court found that the phrase "portion, split, or percentage," which ordinarily means a part of the whole, reinforced its conclusion that Section 2607(b) does not apply where a single settlement-service provider retains the entire fee received from a customer.

CVSG Cases In Which The Solicitor General Opposed Certiorari[1]

1. ***Douglas v. Independent Living Center of Southern California, Inc.*, No. 09-958 (9th Cir., 572 F.3d 644; CVSG May 24, 2010; cert. opposed Dec. 3, 2010; cert. granted Jan. 18, 2011, limited to Question 1; consolidated with Nos. 09-1158 and 10-283 on Jan. 18, 2011; SG as amicus, supporting Petitioner; argued on Oct. 3, 2011). Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a State that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit concluded that this provision does not confer any "rights" on Medicaid providers or recipients that are enforceable under 42 U.S.C. § 1983, and Respondents do not contend otherwise. Nonetheless, in the present case, the Ninth Circuit held that § 1396a(a)(30)(A) preempted a state law reducing Medicaid reimbursement payments because the State failed to produce evidence that it had complied with requirements that do not appear in the text of the statute, and because the reductions were motivated by budgetary considerations. The Question Presented is as follows: Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates.**

   Decided Feb. 22, 2012 (565 U.S. ___). Ninth Circuit/Vacated and remanded. Justice Breyer for a 5-4 Court (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, JJ.). The Court held that the Ninth Circuit should determine, in the first instance, whether Medicaid providers and beneficiaries may challenge state Medicaid statutes under the Supremacy Clause when the federal agency that administers Medicaid, the Centers for Medicare & Medicaid Services ("CMS"), has approved the state Medicaid statutes as consistent with federal law. The Court granted certiorari to determine whether Medicaid providers and recipients may

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1 In one case, the Court called for the views of the Solicitor General, but the petition was dismissed before those views were submitted: *Sandy Creek Energy v. Sierra Club Club, Inc.*, No. 10-1333 (5th Cir., 627 F.3d 134; CVSG Oct. 3, 2011; petition dismissed Dec. 16, 2011). Whether, after construction of a power plant has begun in reliance on the issuance of a lawful preconstruction permit reflecting that there was no Maximum Achievable Control Technology ("MACT") requirement then in force, a new MACT determination requirement can be compelled during construction, contrary to EPA regulations and judicial interpretations of closely related provisions of the Clean Air Act.

challenge state Medicaid statutes that reduce payments to providers under the Supremacy Clause, but, after certiorari was granted, CMS determined that the relevant state statutes comply with federal law. The Court observed that this development may require the Respondents to seek review of CMS's determination under the Administrative Procedure Act. Recognizing that the parties had not fully argued this question, and due to the complexity involved, the Court vacated the Ninth Circuit's judgments and remanded the cases to permit "the parties to argue the matter before that Circuit in the first instance."

2. ***PPL Montana, LLC v. Montana*, No. 10-218 (Mont., 229 P.3d 421; CVSG Nov. 1, 2010; cert. opposed May 20, 2011; cert. granted June 20, 2011, limited to the first Question Presented; SG as amicus, supporting Petitioner; argued on Dec. 7, 2011). Whether the constitutional test for determining whether a section of a river is navigable for title purposes requires a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union, or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use.**

Decided Feb. 22, 2012 (565 U.S. ___). Mont./Reversed and remanded. Justice Kennedy for a 9-0 Court. The Court held that the Montana Supreme Court erred in concluding that the State of Montana held title to the portions of three riverbeds occupied by the Petitioner's hydroelectric facilities. Under the equal-footing doctrine, a State holds title within its borders to the beds of rivers and other waters that were navigable in fact at the time the State entered the Union. Rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). The Court concluded that the Montana Supreme Court committed two critical errors in applying the equal-footing doctrine. First, it considered the navigability of each river as a whole instead of on a segment-by-segment basis. "The segment-by-segment approach to navigability for title is well settled," the Court emphasized, "and it should not be disregarded." The lower court determined that the segment-by-segment approach is inapplicable to short interruptions of navigability in a stream otherwise navigable, so long as those short interruptions can be managed by way of an overland portage. The Court rejected this determination, explaining that in most cases portages are sufficient to defeat a finding of navigability because they require transportation over land rather than over water. The Montana Supreme Court's second critical error was its reliance upon evidence of present-day recreational uses of one of the rivers to support its finding of navigability. This was error, the Court explained, not only because navigability must be assessed as of the time of statehood, but also because navigability concerns the river's usefulness for trade and travel rather than for other purposes. Although consideration of a river's contemporary noncommercial use is not *per se* erroneous, evidence of such use is relevant only if it is shown that there have not been material changes to either the watercraft being used and/or the physical condition of the river since the time of statehood. Montana had not made such a showing. Because these two errors required reversal of the judgment below, the Court did not reach the Petitioner's contention that the lower court had

erred by not assigning the burden of proof to the State as the party seeking to establish navigability.

3. ***National Meat Association v. Harris*, No. 10-224 (9th Cir., 599 F.3d 1093; CVSG Jan. 18, 2011; cert. opposed May 26, 2011; cert. granted June 27, 2011; SG as amicus, supporting Petitioner; argued on Nov. 9, 2011). The Questions Presented are: (1) Whether the Ninth Circuit erred in holding that a "presumption against preemption" requires a "narrow interpretation" of the Federal Meat Inspection Act's ("FMIA") express preemption provision, in conflict with the Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), that the provision must be given "a broad meaning." (2) Whether, when federal food safety and humane handling regulations specify that animals (here, swine) which are or become nonambulatory on federally inspected premises are to be separated and held for observation and further disease inspection, the Ninth Circuit erred in holding that a state criminal law which requires that such animals not be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA. (3) Whether the Ninth Circuit erred in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally regulated slaughterhouses.**

   Decided Jan. 23, 2012 (565 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kagan for a 9-0 Court. The Court held that the Federal Meat Inspection Act ("FMIA"), which regulates slaughterhouses to ensure both the safety of meat and the humane handling of animals, expressly preempted a California law dictating requirements for the treatment of nonambulatory pigs. The FMIA and its implementing regulations establish procedures for the inspection of each animal brought to a slaughterhouse. If an inspector determines that an animal is dead, dying, or afflicted with a serious disease or condition, he must designate the animal as "U.S. Condemned," the animal must be separately killed, and no part of the carcass may be sold for human consumption. If the animal has a less severe condition, the inspector must classify the animal as "U.S. Suspect"—a classification that includes all nonambulatory animals not subject to condemnation. Suspect animals must be slaughtered separately, but parts of the carcass may be processed into food for humans after inspection. The FMIA also preempts all state laws "which are in addition to, or different than those made under" the FMIA. California's law bars slaughterhouses from buying, selling, or receiving a nonambulatory animal, bars them from selling meat from such an animal, and requires them to immediately euthanize the animal. In essence, the California law adds additional requirements for the treatment of nonambulatory animals not found in the federal scheme. The state law is therefore preempted by the FMIA.

4. ***First American Financial Corp. v. Edwards*, No. 10-708 (9th Cir., 610 F.3d 514; CVSG Feb. 28, 2011; cert. opposed May 19, 2011; cert. granted June 20, 2011, limited to the second Question Presented; argued on Nov. 28, 2011). Section**

8(a) of the Real Estate Settlement Procedures Act of 1974 (the "Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2). Under the Act, a person seeking a monetary recovery need not show that the kickback arrangement affected the price, the quality, or any other characteristic of the settlement service. The Ninth Circuit held that an invasion of this statutory right by itself constitutes an injury for purposes of Article III standing, regardless of whether the plaintiff can demonstrate an additional harm resulting from the invasion of that right. The Question Presented is whether a private purchaser of real estate settlement services has standing to sue under Article III, § 2 of the United States Constitution.

5. ***Farina v. Nokia, Inc.*, No. 10-1064 (3d Cir., 625 F.3d 9; CVSG May 31, 2011; cert. opposed Aug. 26, 2011; cert. denied Oct. 3, 2011). The Questions Presented are the following: (1) Whether a regulation based on authority conferred by a statute that explicitly disclaims any implied preemptive effect can impliedly preempt state law on a "frustration of purpose" theory of preemption. (2) Whether an agency's National Environmental Policy Act regulation, which imposes no substantive requirements, may preempt substantive state health, safety, or consumer-protection laws.**

6. ***Countrywide Home Mortgages v. Rodriguez*, No. 10-1285 (3d Cir., 629 F.3d 136; CVSG June 20, 2011; cert. opposed Oct. 14, 2011; cert. denied Nov. 14, 2011). Whether the Bankruptcy Code's automatic stay, 11 U.S.C. § 362, takes precedence over a mortgage lender's right under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2609(a)(2), to require a borrower to deposit additional funds into his escrow account after filing for Chapter 13 bankruptcy protection when those funds are needed to cover the borrower's anticipated post-petition taxes, insurance, and other escrow obligations.**

7. ***Compton Unified School District v. Addison*, No. 10-886 (9th Cir., 598 F.3d 1181; CVSG Apr. 18, 2011; cert. opposed Nov. 18, 2011; cert. denied Jan. 9, 2012). Whether the special education due process hearing procedures under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, allow a parent to bring a claim of negligence against a school district, or whether due process hearing claims are limited to disputes regarding intentional decisions made by the school district.**

8. ***Republica Bolivariana de Venezuela v. DRFP L.L.C.*, No. 10-1144 (6th Cir., 622 F.3d 513; CVSG May 16, 2011; cert. opposed Dec. 22, 2011; cert. denied Jan. 23, 2012). Under the commercial activity exception of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–11, a foreign state**

is not immune from suit in U.S. court if a claim is based on the state's act outside the United States in connection with a commercial activity abroad, and that act causes a "direct effect" in the United States. *Id.* § 1605(a)(2). In this case, the plaintiff sued to obtain payment on two promissory notes purportedly issued by a Venezuelan state-owned bank. The plaintiff acquired the notes abroad from a foreign entity, brought them into the United States, and demanded payment in Ohio. The Question Presented is whether a foreign state's refusal to honor a demand for payment on the state's alleged securities at a U.S. location causes a "direct effect" in the United States based merely on the failure of the securities to exclude the United States as a place of payment.

9. ***Fein, Such, Kahn & Shepard, PC v. Allen*, No. 10-1417 (3d Cir., 629 F.3d 36; CVSG Oct. 3, 2011; cert. opposed Dec. 23, 2011; cert. denied Jan. 23, 2012). Whether a communication from a debt collector to a debtor's attorney is actionable under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*.**

10. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011; cert. opposed Feb. 9, 2012; cert. granted Mar. 19, 2012). Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of one or more attorneys," entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel.**

11. ***Saint-Gobain Ceramics v. Siemens Medical Solutions*, No. 11-301 (Fed. Cir., 647 F.3d 1373; CVSG Nov. 7, 2011; cert. opposed Apr. 25, 2012; cert. denied May 29, 2012). The Patent and Trademark Office ("PTO") determines whether the standards governing patentability are met, including whether a claimed invention is non-obvious over prior art. 35 U.S.C. § 103. Where the PTO finds that these standards are satisfied, the resulting patent (and the patentability determinations underlying it) is presumed valid, *id.* § 282, and that presumption can be overcome only by clear and convincing evidence. *Microsoft Corp. v. i4i. Ltd. P'ship*, 131 S. Ct. 2238 (2011). In light of this scheme, the Questions Presented are: (1) Whether the PTO's presumptively valid finding that an invention is not obvious and is thus patentable over a prior art patent is impermissibly nullified or undermined when a jury is allowed to find, by a mere preponderance of the evidence, that the patented invention is "insubstantially different" from the very same prior art patent, and thus infringes that prior art patent under the "doctrine of equivalents." (2) Whether, as the dissent below warned, the Federal Circuit's failure to impose a heightened evidentiary standard to ensure that juries do not use the doctrine of equivalents to override the PTO's presumptively valid non-obvious determinations undermines the reasonable reliance of competitors and investors on such PTO determinations, thereby intolerably increasing uncertainty over claim scope, fostering litigation, "deter[ring] innovation and hamper[ing] legitimate competition."**

12. ***DirectTV, Inc. v. Levin*****, No. 10-1322 (Ohio, 941 N.E.2d 1187; CVSG Oct. 3, 2011; cert. opposed May 23, 2012). The Questions Presented are: (1) Whether, in a Commerce Clause challenge to a state statute, courts need not examine the effects of the statute if it can be characterized as distinguishing between two competitors based upon their different methods of operation. (2) Whether courts need not examine the statute's effects because some of the beneficiaries of the discriminatory scheme are major interstate companies.**

13. ***Los Angeles County Flood Control District v. Natural Resources Defense Council*****, No. 11-460 (9th Cir., _ F.3d _, 2011 WL 2712963; CVSG Jan. 17, 2012; cert. opposed May 23, 2012). The Questions Presented are: (1) Whether "navigable waters of the United States" include only "naturally occurring" bodies of water so that construction of engineered channels or other man-made improvements to a river as part of municipal flood and storm control, renders the improved portion no longer a "navigable water" under the Clean Water Act. (2) Whether, when water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system into a lower portion of the same river, there can be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.**

14. ***Faculty Senate of Florida International University v. Florida*****, No. 10-1139 (11th Cir., 616 F.3d 1206; CVSG May 16, 2011; cert. opposed May 24, 2012). The Questions Presented are: (1) Whether Florida's prohibition on the use of state or private funds by universities to support academic travel to Cuba and other disfavored nations is consistent with the Court's decision in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). (2) Whether state-enacted economic sanctions that restrict the use of both public and private funds are preempted by federal law.**

15. ***Bank Melli Iran New York Representative Office v. Weinstein*****, No. 10-947 (2d Cir., 609 F.3d 43; CVSG June 13, 2011; cert. opposed May 24, 2012). In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), the Court held that foreign "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27. That principle is also reflected in numerous treaties that require the United States to recognize the juridical status of foreign entities. In the decision below, the Second Circuit held that a judgment-creditor of Iran could execute against assets of an Iranian bank that is juridically separate from the Iranian government, even though the bank was not a party to the judgment and has no relation to the events underlying it. The court reached that conclusion by construing a parenthetical reference in the Terrorism Risk Insurance Act of 2002**

("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, to override *Bancec*. The court then applied its interpretation retroactively to the already final pre-TRIA judgment in this case. The Questions Presented are: (1) Whether the TRIA overrides this Court's holding in *Bancec* and applicable treaty provisions by authorizing creditors of a foreign sovereign to execute against assets of the sovereign's juridically distinct instrumentalities. (2) Whether Congress violated *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), by retroactively revising the parties bound by a judgment that was already final when the statute was enacted.

16. ***Cook v. Rockwell International Corp.*, No. 10-1377 (10th Cir., 618 F.3d 1127; CVSG Oct. 3, 2011; cert. opposed May 24, 2012). The Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), establishes a compensation regime for any "nuclear incident," a term that includes radioactive discharges causing "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property." 42 U.S.C. § 2014(q). Congress provided that, in suits covered by the Act, "the substantive rules for decision . . . shall be derived from the law of the State in which the nuclear incident involved occurs," unless state law is inconsistent with certain provisions of the Act. *Id.* § 2014(hh). The Questions Presented are: (1) Whether state substantive law controls the standard of compensable harm in suits under the Price-Anderson Act, or whether the Act instead imposes a federal standard. (2) Whether, if a federal standard applies, a property owner whose land has been contaminated by radioactive plutonium, resulting in lost property value, must show some physical injury to the property beyond the contamination itself in order to recover for damage to property.**

17. ***Decker v. Northwest Environmental Defense Center*, No. 11-338 (9th Cir., 640 F.3d 1063; CVSG Dec. 12, 2011; cert. opposed May 24, 2012). Congress has authorized citizens dissatisfied with the Environmental Protection Agency's ("EPA") rules implementing the Clean Water Act's ("CWA's") National Pollutant Discharge Elimination System ("NPDES") permitting program to seek judicial review of those rules in the Courts of Appeals. *See* 33 U.S.C. § 1369(b). Congress further specified that those rules cannot be challenged in any civil or criminal enforcement proceeding. Consistent with the terms of the statute, multiple circuit courts have held that if a rule is reviewable under 33 U.S.C. § 1369, it is exclusively reviewable under that statute and cannot be challenged in another proceeding. In addition, in 33 U.S.C. § 1342(p), Congress required NPDES permits for stormwater discharges "associated with industrial activity," and delegated to the EPA the responsibility to determine what activities qualified as "industrial" for purposes of the permitting program. The EPA determined that stormwater from logging roads and other specified silvicultural activities is non-industrial stormwater that does not require an NPDES permit. *See* 40 C.F.R. § 122.26(b)(14). The Questions Presented are: (1) Whether the Ninth Circuit erred when it held that a citizen may bypass judicial review of an NPDES permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA. (2) Whether the**

Ninth Circuit erred when it held that storm-water from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater.

18. ***Georgia-Pacific West v. Northwest Environmental Defense Center*, No. 11-347 (9th Cir., 640 F.3d 1063; CVSG Dec. 12, 2011; cert. opposed May 24, 2012). Since passage of the Clean Water Act, the Environmental Protection Agency ("EPA") has considered runoff of rain from forest roads—whether channeled or not—to fall outside the scope of its National Pollutant Discharge Elimination System ("NPDES") and thus not to require a permit as a point source discharge of pollutants. Under a rule first promulgated in 1976, the EPA consistently has defined as nonpoint source activities forest road construction and maintenance from which natural runoff results. And in regulating stormwater discharges under 1987 amendments to the Act, the EPA again expressly excluded runoff from forest roads. Consequently, forest road runoff has been regulated as a nonpoint source using best management practices, like those imposed by the State of Oregon on the roads at issue here. The EPA's consistent interpretation of more than 35 years has survived proposed regulatory revision and legal challenge, and repeatedly has been endorsed by the United States in briefs and agency publications. The Ninth Circuit—in conflict with other circuits, contrary to the position of the United States as amicus, and with no deference to the EPA—rejected the EPA's longstanding interpretation. Instead, it directed the EPA to regulate channeled forest road runoff under a statutory category of stormwater discharges "associated with industrial activity," for which a permit is required. The Question Presented is: Whether the Ninth Circuit should have deferred to the EPA's longstanding position that channeled runoff from forest roads does not require a permit, and erred when it mandated that the EPA regulate such runoff as industrial stormwater subject to NPDES.**

19. ***Vance v. Ball State University*, No. 11-556 (7th Cir., 646 F.3d 461; CVSG Feb. 21, 2012; cert. opposed May 24, 2012). In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim's co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a "supervisor" and who had the authority to direct and oversee the victim's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The Question Presented is whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" the victim.**

20. ***Pacific Merchant Shipping Ass'n v. Goldstene*****, No. 10-1555 (9th Cir., 39 F.3d 1154; CVSG Oct. 3, 2011; cert. opposed May 25, 2012). On July 1, 2009, the California Air Resources Board began enforcement of regulations that require foreign- and U.S.-flagged ocean-going vessels engaged in international and interstate commerce to use specified low-sulfur fuels whenever those ships are bound to or from California ports and within 24 miles of the California coastline. These rules, adopted to reduce vessel emissions of diesel particulates and other air pollutants, apply, at an aggregate compliance cost estimated at $1,500,000,000, to a predominately foreign-flagged group of ships that call at California ports more than 10,000 times annually and carry more than 40% of the nation's containerized imports into California each year. The Questions Presented are: (1) Whether the Commerce Clause and the Supremacy Clause prohibit California's extraterritorial exercise of its police powers to require the use of specified low-sulfur fuels on foreign- and U.S.-flagged vessels engaged in foreign and interstate commerce while these ships are on the high seas. (2) Whether, by establishing the measure of California's seaward boundary at "three geographical miles distant from its coast line," the Submerged Lands Act, 43 U.S.C. § 1312, preempts California's regulations that require foreign- and U.S.-flagged vessels engaged in international and interstate commerce to use specified low-sulfur fuels while those ships are navigating outside of the State's three-mile seaward territorial boundary so established.**

Gibson Dunn – Counsel for Amicus Curiae Center for Equal Opportunity in Support of Petitioners

21. ***Corboy v. Louie*****, No. 11-336 (Haw., 251 P.3d 601; CVSG Dec. 12, 2011; cert. opposed May 25, 2012). In *Rice v. Cayetano*, 528 U.S. 495 (2000), the Court held that a state classification of voters according to whether they are "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778" was an impermissible racial classification under the Fifteenth Amendment. Respondents have employed the same classification to determine whether a taxpayer is eligible for certain long-term leases that entitle lessees to significant tax exemptions. No equivalent exemption is available to Petitioners because they do not fall within that racial classification. Petitioners paid their taxes under protest and then sought refunds from their respective counties on the ground that their tax bills resulted from a racial classification inconsistent with the Constitution. The Hawaii courts declined to apply *Rice* or subject the classification to strict scrutiny. The Question Presented is: Whether the Hawaii courts erred in holding that Petitioners did not have standing to seek a refund of their own taxes, and whether the Equal Protection Clause precludes a State or municipality from creating tax exemptions that are available only to members of a certain race.**

Gibson Dunn – Counsel for EM Ltd., et al.

22. ***EM Ltd. v. Argentina*****, No. 11-604 (2d Cir., 652 F.3d 172; CVSG Jan. 17, 2012; cert. opposed May 25, 2012). Section 1610 of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq*., sets forth the circumstances in which property of a foreign state or its agency or instrumentality "shall not be immune" from prejudgment attachment or execution in satisfaction of a judgment. 28 U.S.C. § 1610. Section 1611**

restores immunity to property "of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent government, has explicitly waived its immunity." *Id.* § 1611(b)(1). In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that in certain circumstances of injustice or control, the separate juridical status of a foreign state's agency or instrumentality should be disregarded. *Id.* at 629. In such cases, the agency or instrumentality should be treated as the alter ego of the foreign state, and "one may be held liable for the actions of the other." *Id.* When a central bank has been adjudicated under *Bancec* to be the alter ego of a foreign state that has waived immunity from attachment and execution, does Section 1611(b)(1) of the FSIA immunize the assets held in the name of that bank?

Gibson Dunn – Counsel for Rubin, et al.

23. **_Rubin v. Iran_, No. 11-431 (7th Cir., 637 F.3d 783; CVSG Feb. 21, 2012; cert. opposed May 25, 2012). Section 1609 of the Foreign Sovereign Immunities Act of 1976 ("FSIA") provides that the property of a foreign state and its agencies and instrumentalities is immune from execution and attachment unless that property falls within a statutory exception to immunity. *See* 28 U.S.C. § 1609. The Seventh Circuit interpreted this immunity as imposing limitations on discovery in aid of execution; it concluded, contrary to decisions from the Second and Ninth Circuits, that such discovery is limited under the FSIA to "specific property the plaintiff has identified" as potentially subject to attachment. Applying this test, the Seventh Circuit reversed an order compelling the Islamic Republic of Iran to provide general discovery regarding its assets in the United States, which Petitioners had requested in order to obtain the information necessary to enforce an outstanding judgment against Iran. The Question Presented is whether Section 1609 of the FSIA permits discovery in aid of execution only with respect to specific property identified by the plaintiff as potentially subject to attachment.**

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